promissory notes specifying set interest rates and outlining key repayment terms. *See* 85 Fed. Reg. at 20,813 (establishing 1% interest rates and two-year maturation dates for PPP loans); *see* 85 Fed. Reg. at 20,814 (clarifying that "[i]f you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts"); *see* Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,450–52 (outlining promissory notes requirements) (Small Bus. Admin. Apr. 28, 2020).

Moreover, although the first interim final rule did not specify that all bankruptcy debtors were ineligible to receive PPP funds, it established the use of the PPP Application form, which asks applicants whether they are "presently involved in any bankruptcy" and provides that, if the applicant's answer is "'Yes,' the loan will not be approved." SMALL BUS. ADMIN, PAYCHECK PROTECTION PROGRAM BORROWER APPLICATION FORM 2483 (VERSION 1), https://www.sba.gov/sites/default/files/2022-02/PPP-Borrower-Application-Form-Fillable.pdf; *see* 85 Fed. Reg. at 20,814 (establishing use of SBA Form 2483). In its fourth interim final rule, the SBA explicitly clarified that bankruptcy debtors are ineligible to receive PPP funds, explaining that "[t]he Administrator, in

consultation with the Secretary [of the Treasury], determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans." *See* 85 Fed. Reg. at 23,451.

II. Procedural History

Springfield is a non-profit critical access hospital and medical services provider located in Springfield, Vermont, that employs over 670 employees. On June 26, 2019, Springfield commenced voluntary chapter 11 bankruptcy proceedings, but has continued to operate its businesses as a debtor-in-possession. After the onset of the COVID-19 pandemic, the majority of Springfield's outpatient procedures, non-essential medical procedures, and office visits were cancelled, postponed, or rescheduled pursuant to federal and state orders and recommendations. As a significant portion of Springfield's revenue streams are derived from these services, the cancellations and postponements had a severe impact on Springfield's cash flow, materially exacerbating Springfield's already-existing financial problems. Due to this negative impact on its income, Springfield anticipated serious difficulties with paying its near-term operating expenses and consequently applied for multiple state and federal emergency grants, including,

as relevant here, PPP loans.[6] At the time of its application, Springfield was in chapter 11 bankruptcy status. Because of this status, Springfield's PPP applications were denied.[7]

On April 27, 2020, Springfield filed suit in bankruptcy court in the District of Vermont against the SBA Administrator in her official capacity, alleging, *inter alia*, that the SBA's administration of the PPP discriminated against Springfield in violation of Section 525(a) of the Bankruptcy Code, and seeking an order "enjoining SBA . . . from denying an application under PPP on the basis that the applicant is a debtor in bankruptcy."[8] Joint App'x at 18–23. In opposition, the SBA

[6] Between April and May 2020, Springfield received approximately $5.6 million in federal stimulus funds for rural healthcare providers and borrowed approximately $498,800 in prospective Medicaid payments from the State of Vermont. Further, in May 2020, Springfield was informed it would receive a grant of approximately $531,000 from the federal government to expand its testing capabilities for COVID-19. By the time of the bankruptcy court's decision, these funds had mitigated Springfield's immediate risk of having to close the hospital and medical care centers, though Springfield's counsel represented at oral argument that the hospital system had to discontinue dental services in certain areas due to budget shortfalls. *See* Oral Arg. at 23:50–24:01.

[7] Springfield applied for PPP funds from private commercial lenders Berkshire Bank and Mascoma, both of which denied Springfield's applications on April 13, 2020 and April 30, 2020, respectively. Although the SBA's interim fourth rule had not been released at this time, the application denials were based upon SBA Form 2483 and additional guidance from the SBA. Neither party disputes that Springfield's applications were denied solely because of its status as a debtor in bankruptcy.

[8] In addition to its Section 525(a) claim and its request for injunctive relief to bar the SBA from denying its PPP application on the basis of its bankruptcy status, Springfield also sought: (1) declaratory relief that the "CARES Act requires its Application to be considered on the same

argued that (1) the PPP was a loan program not covered under Section 525(a), and (2) Springfield was unable to obtain injunctive relief due to SBA's sovereign immunity pursuant to Section 634(b)(1), which provides that "no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the [SBA] Administrator or [her] property." 15 U.S.C. § 634(b)(1). After an emergency hearing, the bankruptcy court granted Springfield a temporary restraining order, which was later extended through the duration of the proceedings. Because the parties agreed there were no material facts in dispute with respect to the Section 525(a) claim asserted by Springfield, the bankruptcy court bifurcated the proceedings and directed the parties to proceed with briefing their motion for summary judgment on the Section 525(a) claim.

On June 22, 2020, the bankruptcy court issued an order and accompanying Memorandum of Decision granting summary judgment in Springfield's favor and enjoining the SBA from denying Springfield's PPP application.[9] Specifically, the

terms as other qualified businesses that are not presently debtors"; (2) a writ of mandamus against the SBA Administrator to implement the PPP in a way that does not violate Section 525(a); and (3) damages in the event that injunctive relief is not granted and "it is later determined that [Springfield] was eligible for PPP funds but none remain available." Joint App'x at 18–23.

[9] The bankruptcy court issued a detailed permanent injunction that not only enjoined the SBA (and the relevant participating commercial lenders) from denying Springfield's PPP application, but also required that the enjoined parties treat May 15, 2020 as the date on which Springfield

bankruptcy court held that: (1) *In re Goldrich*, 771 F.2d 28 (2d Cir. 1985)—the controlling precedent cited by the SBA, which held that Section 525(a) did not protect extensions of credit—had been overruled by congressional abrogation and a later circuit decision; (2) regardless, the PPP was an "other similar grant" within the meaning of Section 525(a), not a loan program, and thus, the SBA's exclusion of debtors in bankruptcy from the PPP violated Section 525(a); (3) Section 634(b)(1) did not bar an injunction against the SBA and, accordingly, the bankruptcy court could enjoin the SBA from taking any action that would violate Section 525(a); and (4) Springfield had met the necessary standard to obtain a permanent injunction.

This appeal followed.[10]

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received the PPP funds and as the start of the "covered period," as defined under the CARES Act, even though Springfield would not actually receive any PPP funds until a later date. The injunction also specified that Springfield would submit its PPP forgiveness applications at the end of the covered period, clarifying that "[t]his fictional approval date is necessary to protect the rights of the Enjoined Parties and is consistent with the stay of certain crucial deadlines." Special App'x at 40. The bankruptcy court further outlined that "[u]pon entry of a final order . . . that is not subject to further appeal . . . the Enjoined Parties shall promptly disburse the PPP funds to Plaintiffs." Special App'x at 41.

[10] After the bankruptcy court issued its order, the SBA sought to have the decision reviewed by the district court in the first instance. However, on July 31, 2020, in response to Springfield's request, the bankruptcy court entered an order certifying its decision for direct appeal to this Court pursuant to 28 U.S.C. § 158(d)(2), which permits direct appeal of a bankruptcy court order or judgment to the appropriate court of appeals, providing the court of appeals permits, "if the bankruptcy court certifies that either '(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision . . . or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially

III. PPP Litigation under Section 525(a) in Other Courts

Around the same time as the instant action, numerous challenges to the SBA's exclusion of bankrupt debtors from the PPP were brought in federal courts around the country. When the bankruptcy court issued its order that is the subject of the instant appeal, it identified multiple recent PPP-related decisions addressing Section 525(a) in both bankruptcy courts and district courts.[11] Of the proceedings that reached a decision by the time the bankruptcy court issued its order, at least fourteen courts had concluded—either directly or by determining that the plaintiffs were unlikely to succeed on the merits—that the PPP was not covered by Section 525(a).[12] We note that one such case was brought in the Western District

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advance the progress of the case." *Weber v. United States Tr.*, 484 F.3d 154, 157 (2d Cir. 2007) (quoting 28 U.S.C. § 158(d)(2)(A)(i)–(iii)). On November 19, 2020, we concluded that the bankruptcy court's order satisfied Section 158(d)(2) and authorized this appeal.

[11] Although the bankruptcy court referenced thirty-four PPP-related cases, we reference only the cases that decided the Section 525(a) issue, as some cases were voluntarily dismissed and many were decided on, *inter alia*, claims brought under the Administrative Procedure Act ("APA").

[12] *Cosi, Inc. v. U.S. Small Bus. Admin.*, Adv. Proc. No. 20-50591 (BLS) (Bankr. D. Del. April 30, 2020); *Trudy's Texas Star, Inc. v. Carranza*, Adv. Proc. No. 20-ap-01026-hcm (Bankr. W.D. Tex. May 7, 2020); *Breda, LLC v. Carranza*, Adv. Proc. No. 20-ap-01008 (Bankr. D. Me. May 11, 2020); *Asteria Educ., Inc. v. Carranza*, Adv. Proc. No. 20-ap-05024-cag (Bankr. W.D. Tex. May 14, 2020); *Weather King Heating & Air, Inc. v. U.S. Small Bus. Admin.*, Adv. Proc. No. 20-ap-05023-amk (Bankr. N.D. Ohio May 21, 2020); *Schuessler v. U.S. Small Bus. Admin*, Adv. Proc. No. 20-02065-bhl, 2020 WL 2621186, at *9 (Bankr. E.D. Wi. May 22, 2020); *Starplex Corp. v. Carranza*, Adv. Proc. No. 20-ap-00095-DPC (Bankr. D. Ariz. May 26, 2020); *Matter of Henry Anesthesia Assocs. LLC*, Adv. Proc. No. 20-06084-LRC, 2020 WL 3002124, at *5–6 (Bankr. N.D. Ga. June 4, 2020); *iThrive Health, LLC v. Carranza*, 623 B.R. 392, 401–02 (Bankr. D. Md. 2020); *Diocese of Rochester v. U.S. Small Bus. Admin*, 466 F. Supp. 3d 363, 370 (W.D.N.Y. 2020); *USA Gymnastics v. U.S. Small Bus. Admin.*, Adv. Proc.

of New York. The district court ultimately granted summary judgment to the SBA on the Section 525(a) claim and thus created a split of authority among lower courts within this circuit. *See Diocese of Rochester*, 466 F. Supp. 3d at 379–80 (holding that the PPP was a "loan" not covered by Section 525(a)). In contrast, six courts concluded that Section 525(a) *did* extend to the PPP.[13] Since the bankruptcy court's decision here, at least four additional courts have determined that Section 525(a) does not apply to the PPP, while no additional courts have determined that it does.[14]

No. 20-ap-50055 (Bankr. S.D. Ind. June 12, 2020), *aff'd* 2020 WL 4932233, at *1–2 (S.D. Ind. June 22, 2020); *PCT Int'l, Inc. v. U.S. Small Bus. Admin.*, Adv. Proc. No. 20-ap-00118-PS (Bankr. D. Ariz. June 12, 2020); *Fox Valley Pro Basketball, Inc. v. U.S. Small Bus. Admin.*, Case No. 20-C-793, 2020 U.S. Dist. LEXIS 105355, at *2 (E.D. Wi. June 16, 2020); *In re Penobscot Valley Hosp.*, Adv. Proc. No. 20-1005, 2020 WL 3032939, at *10–16 (Bankr. D. Me. June 3, 2020), *adopted in part*, 620 B.R. 1 (D. Me. 2020).

[13] *In re Hidalgo Cty. Emergency Serv. Found.*, Adv. Proc. No. 20-2006, 2020 WL 2029252, at *1 (Bankr. S. D. Tex. Apr. 25, 2020), *rev'd* 962 F.3d 838 (5th Cir. 2020); *In re Organic Power LLC*, 619 B.R. 540, 550 (Bankr. D. P.R. 2020); *KP Eng'g LP v. U.S. Small Bus. Admin.*, Adv. Proc. No. 20-ap-03120 (Bankr. S.D. Tex. May 18, 2020) (preliminary injunction entered on May 18, 2020, adversary proceeding dismissed as moot by agreement of the parties on June 30, 2020); *St. Alexius Hosp. Corp. #1 v. Carranza*, Adv. Proc. No. 20-ap-06005-grs (Bankr. E.D. Ky. May 22, 2020) (subsequently voluntarily dismissed without prejudice); *Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Bus. Admin.*, 615 B.R. 644, 656–57 (Bankr. D. N.M. 2020); *In re Skefos*, Adv. Proc. No. 20-00071, 2020 WL 2893413, at *16 (Bankr. W.D. Tenn. June 3, 2020). One such decision was later reversed on grounds other than the Section 525(a) claim. *See In re Hidalgo Cty. Emergency Serv. Found.*, 962 F.3d at 840–41 (reversing the bankruptcy court on the grounds that, per Fifth Circuit precedent, the SBA had sovereign immunity from injunctive relief under Section 634(b)(1), and thus had been improperly enjoined).

[14] *See In re Dancor Transit*, No. Case No. 2:20-bk-70536, 2020 WL 4730896, at *7–8 (Bankr. W.D. Ark. June 22, 2020); *Tradeways, Ltd. v. U.S. Dep't of the Treasury*, Case No. ELH-20-1324, 2020 WL

In sum, at the time of this opinion's publication, approximately eighteen courts have determined that the PPP is not protected by Section 525(a). No circuit court, however, has addressed this precise issue.

IV. Post-CARES Act Congressional Action

On December 27, 2020, Congress enacted the Consolidated Appropriations Act 2021, Pub L. No. 116-260, 134 Stat. 1182 (2020). As relevant here, the Consolidated Appropriations Act amended Section 525 to prohibit the exclusion of debtors in bankruptcy from certain benefits under the CARES ACT—namely, foreclosure moratoriums, eviction moratoriums, and the forbearance of some residential mortgages—solely based on their status as debtors in bankruptcy. *See* 11 U.S.C. § 525(d) ("A person may not be denied relief under sections 4022 through 4024 of the CARES Act (15 U.S.C. 9056, 9057, 9058) because the person is or has been a debtor under this title."). Notably, this amendment did not include PPP in the list of covered benefits, nor did it alter the text of Section 525(a). Additionally, the Consolidated Appropriations Act included provisions continuing the PPP through the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues

3447767, at *16 (D. Md. June 24, 2020); *In re Vestavia Hills, Ltd.*, 630 B.R. 816, 848–49 (S.D. Cal. 2021); *Archbishop of Agaña v. U.S. Small Bus. Admin*, Adv. Proc. No. 20-00002, 2021 WL 1702311, at *8 (D. Guam Feb. 23, 2021).

Act ("Economic Aid Act"), which extended the SBA's authority to make PPP loans through March 31, 2021, and provided a mechanism for certain bankrupt debtors to seek and obtain approval for PPP loans.[15] *See* Pub. L. No. 116-260, div. N, tit. III, 134 Stat. at 1993 (Economic Aid Act), 2019 (extension to March 31). Springfield does not argue that it could qualify for PPP loans under the Economic Aid Act.

DISCUSSION

On appeal, the SBA contends that the bankruptcy court erred in concluding that Section 525(a) applied to the PPP. Specifically, the SBA asserts that our precedent in *Goldrich* establishes that extensions of credit are not protected by Section 525(a) and argues that the bankruptcy court erred by (1) reasoning that *Goldrich* was no longer viable precedent, and (2) concluding that the PPP was a grant program covered under Section 525(a), not an uncovered loan guarantee program. Additionally, the SBA contends that the bankruptcy court lacked authority to enjoin the SBA's policy because of the injunction bar in Section 634(b)(1).

[15] Section 320 of the Economic Aid Act empowers bankruptcy courts to, effective only upon approval of the SBA Administrator, authorize debtors under specific categories of bankruptcy to obtain a PPP loan. Economic Aid Act §§ 320, 320(f), Title III of Div. N of Pub. L. No. 116-260, 134 Stat. 1182, 2015–16 (2020).

We review *de novo* a bankruptcy court's grant of summary judgment. *See In re Treco*, 240 F.3d 148, 155 (2d Cir. 2001). A motion for summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *In re Dana Corp.*, 574 F.3d 129, 151 (2d Cir. 2009). Where the grant of summary judgment "presents only a legal issue of statutory interpretation . . . we review *de novo* whether the district court correctly interpreted the statute." *Hayward v. IBI Armored Servs., Inc.*, 954 F.3d 573, 575 (2d Cir. 2020) (internal quotation marks omitted).

Moreover, when reviewing an order granting a permanent injunction, we review the lower court's conclusions of law *de novo* and its ultimate decision for abuse of discretion. *Goldman, Sachs & Co v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014). An abuse of discretion occurs when the lower court's decision rests on a clearly erroneous factual finding or an error of law or cannot be located within the range of permissible decisions. *ACORN v. United States*, 618 F.3d 125, 133 (2d Cir. 2010).

As discussed below, we hold that, as a matter of law, the PPP is a loan guaranty program and not an "other similar grant," and thus is not covered by

Section 525(a). Accordingly, the bankruptcy court erred in interpreting the statute and granting summary judgment in Springfield's favor on the Section 525(a) claim. Instead, we conclude, as a matter of law, that the SBA is entitled to summary judgment on the Section 525(a) claim. Moreover, because we conclude that Springfield's claim fails on the merits, we vacate the permanent injunction and decline to address whether the SBA has sovereign immunity from injunctive relief under Section 634(b)(1).[16]

I. Sovereign Immunity and Injunctive Relief

Before we analyze Springfield's Section 525(a) claim, we must briefly address whether there is a threshold question of federal sovereign immunity, relating to the availability of injunctive relief in this case, that we must first consider before reaching the merits of the case.

[16] The SBA argues that the plain terms of the statute bar all injunctive relief against it, whereas Springfield argues that the SBA's reading is too narrow and disregards the context of the surrounding terms in the provision. Our sister circuits are split on Section 634(b)(1)'s reach. *Compare Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1057 (1st Cir. 1987) (holding that Section 634(b)(1) does not immunize the SBA from injunctions barring "agency actions that exceed agency authority," as long as the injunction "would not interfere with internal agency operations"), *with Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1290 n.6 (5th Cir. 1994) ("[A]ll injunctive relief directed at the SBA is absolutely prohibited." (internal quotation marks omitted)), *and J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990) ("[C]ourts have no jurisdiction to award injunctive relief against the SBA."). We have not yet addressed this issue and decline to do so here.

Issues of federal sovereign immunity implicate a court's subject-matter jurisdiction, *see Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007), and, as such, are usually threshold issues that must be decided before proceeding to the merits of a given case, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). However, as we have frequently held, there is a distinct difference between jurisdictional questions of a statutory nature and jurisdictional questions of a constitutional nature. *See, e.g.*, *Butcher v. Wendt*, 975 F.3d 236, 242 (2d Cir. 2020) (describing *Steel Co.*'s differentiation between constitutional and statutory jurisdiction and explaining that "[t]he bar on hypothetical jurisdiction, we have held, applies only to questions of Article III jurisdiction" (internal quotation marks omitted)). When a jurisdictional issue is statutory in nature, we are not required to follow a strict order of operations but instead may proceed to dismiss the case on the merits rather than engage with the jurisdictional question, particularly when the jurisdictional issue is complex and the merits are straightforward. *See, e.g.*, *id.* (collecting cases); *Conyers v. Rossides*, 558 F.3d 137, 150 (2d Cir. 2009) (declining to decide a question of federal sovereign immunity where "the question [was] one of statutory rather than constitutional jurisdiction" and instead, "assum[ing] hypothetical jurisdiction" and "proceed[ing] to address the

alternative argument for dismissal offered"); *Ivanishvili v. U.S. Dep't of Just.*, 433 F.3d 332, 338 n.2 (2d Cir. 2006) ("Our assumption of jurisdiction to consider first the merits is not barred where the jurisdictional constraints are imposed by statute, not the Constitution, and where the jurisdictional issues are complex and the substance of the claim is, as here, plainly without merit.").

Moreover, federal sovereign immunity differs from standard threshold matters of Article III jurisdiction in that it can be consented to or waived. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("*Absent a waiver,* sovereign immunity shields the Federal Government and its agencies from suit." (emphasis added)); *cf. Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) ("[T]he Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it." (internal citations omitted)). Other circuits have held that a court is not required to decide the issue of federal sovereign immunity before reaching the merits. *See, e.g.*, *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1255 n.7 (11th Cir. 2020); *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000–01 (D.C. Cir. 1999). *But see In re Hidalgo Cty. Emergency Serv. Found.*, 962 F.3d at 840–41 (concluding that the

bankruptcy court "exceeded its authority" under "well-established Fifth Circuit law," and vacating the preliminary injunction against the SBA).

Here, we similarly conclude that the question of the SBA's sovereign immunity under Section 634(b)(1), related to the issue of the availability of injunctive relief, is not a threshold question we must decide before holding that the Section 525(a) claim fails on the merits. First, it is clear to us that we have jurisdiction over the merits of the underlying dispute. Section 106 of the Bankruptcy Code—entitled "Waiver of sovereign immunity"—expressly abrogates sovereign immunity with respect to Section 525, among other provisions, and provides that a "court may hear and determine any issue arising with respect to the application of such sections to governmental units." 11 U.S.C. § 106(a)(1)–(2); *see F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) ("[A] waiver of sovereign immunity must be unequivocally expressed in statutory text." (internal quotation marks omitted)). Further, Section 634(b)(1)'s own text provides that "[t]he [SBA] may . . . sue and be sued . . . in any United States district court." 15 U.S.C. § 634(b)(1).

Thus, the SBA has *not* asserted immunity from suit. Instead, the SBA concedes that the Bankruptcy Code waives its sovereign immunity, albeit in a

limited fashion, and agrees that the question of its immunity from injunctive relief under Section 634(b)(1) is not a threshold issue that we must decide before we reach the merits. In other words, the SBA is not asserting sovereign immunity as a defense against suit—it is merely raising sovereign immunity as a defense against one particular form of *relief*.[17] As such, we do not view the Section 634(b)(1) question of whether an injunction *can* be issued against the SBA as a threshold question that we must decide before we even determine whether an injunction *should* be issued against the SBA. This is especially true where, as here, the

[17] The SBA's litigation position appears to be what some circuits have termed a "conditional" assertion of sovereign immunity—essentially, when a state or federal governmental unit waives sovereign immunity as to the greater lawsuit but reserves the right to raise immunity as a defense if it loses on the merits. *See McClendon v. Ga. Dep't of Comm. Health*, 261 F.3d 1252, 1258 (11th Cir. 2001). Conditional assertions of immunity, essentially a jurisdictional argument in the alternative, have led some courts to conclude that there is no need to decide the jurisdictional question before reaching the merits. *See, e.g.*, *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1137 (11th Cir. 2019) ("Because sovereign immunity can be waived, our precedent allows us to 'bypass' the threshold question whether an entity is entitled to sovereign immunity where it only conditionally asserts the defense." (internal quotation marks and alterations omitted)); *Floyd v. Thompson*, 227 F.3d 1029, 1035 (7th Cir. 2000) (concluding the court could bypass a complex Eleventh Amendment issue because "the Eleventh Amendment occupies its own unique territory" and "[u]nlike basic subject matter jurisdiction, which can never be stipulated or waived, a state is entitled to waive its Eleventh Amendment immunity from suit if it so desires"); *cf. Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys.*, 173 F.3d 46, 55 (1st Cir. 1999) ("[B]ecause Eleventh Amendment immunity can be waived, the presence of an Eleventh Amendment issue does not threaten the court's underlying power to declare the law."). *But see United States v. Tx. Tech Univ.*, 171 F.3d 279, 285–86 (5th Cir. 1999) ("It is the Eleventh Amendment's restraint on 'Judicial power' that requires us to confront the Eleventh Amendment before employing our power to interpret statutory text.").

plaintiffs seek other forms of relief, such as damages and declaratory relief, as to which no sovereign immunity issue exists. To hold otherwise would require a court to decide a statutory jurisdictional issue related only to one particular form of relief being sought even before deciding whether the party is entitled to any relief at all. We see no legal basis to impose such a stringent requirement here and, accordingly, proceed to discuss the merits of the Section 525(a) claim.[18]

II. Section 525(a)

To establish a violation of Section 525(a), Springfield must demonstrate that: (1) the SBA is a governmental unit; (2) the PPP is covered by the statute; and (3) the SBA discriminated against Springfield solely because of its status as a debtor in bankruptcy. 11 U.S.C. § 525(a). As the SBA is unquestionably a governmental

[18] Moreover, in the near-analogous Eleventh Amendment context, we have similarly declined to engage in a complex jurisdictional analysis when a straightforward basis of decision was available, thereby avoiding unnecessary issues. *See, e.g.*, *Donohue v. Cuomo*, 980 F.3d 53, 77 n.15 (2d Cir. 2020); *Nat'l R.R. Passenger Corp. v. McDonald*, 779 F.3d 97, 100 (2d Cir. 2015); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 431 (2d Cir. 2004); *Tyler v. Douglas*, 280 F.3d 116, 121 (2d Cir. 2001). To be sure, on at least one other occasion, we insisted upon examining the immunity question before reaching the merits of the claim. *See Hale v. Mann*, 219 F.3d 61, 66–67 (2d Cir. 2000). However, in that instance, the state entity in question asserted sovereign immunity from suit entirely, contending that Congress had not validly abrogated the state's sovereign immunity with the Family Medical Leave Act. *Id.* at 66–69. Here, in contrast, the SBA does not contend that it is immune in general, merely that it is immune from injunctive relief.

unit as defined in Title 11,[19] and as the parties do not dispute that Springfield was excluded from the PPP solely based upon its bankruptcy status, the only question before us is whether, as a matter of law, the PPP is a "license, permit, charter, franchise, or other similar grant" covered under Section 525(a). We conclude that it is not. As set forth below, our conclusion is supported by the plain text of the statute, our prior precedent, and subsequent congressional action after the passage of the CARES Act.

A. *The Text of Section 525(a)*

Our analysis begins, as it must, with the plain text of Section 525(a). *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then . . . [the] 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))); *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003) ("Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well."). In looking at a statute's plain meaning, we also must consider the context in which the statutory terms are used, as "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a

[19] The Bankruptcy Code defines a "governmental unit" as "[the] United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. § 101(27).

whole." *United States v. Morton*, 467 U.S. 822, 828 (1984); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) ("The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.").

The meaning of Section 525(a) is plain. Section 525(a) provides, in relevant part, that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a bankrupt or a debtor under the Bankruptcy Act . . . solely because such bankrupt or debtor is or has been . . . a bankrupt or debtor under the Bankruptcy Act." 11 U.S.C § 525(a). The statute's plain text clearly delineates that its protections extend only to specific, enumerated benefits or interests. As the parties appear to agree (and we independently conclude) that the PPP is not a "license," "permit," "charter," or "franchise," we focus our inquiry solely upon "grant."

Because "grant" is undefined, we give the term its ordinary meaning, considering the "commonly understood meaning of the statute's words at the time Congress enacted the statute, and with a view to their place in the overall statutory scheme." *In re Bernard L. Madoff Inv. Secs. LLC*, 12 F.4th 171, 186 (2d Cir. 2021) (internal quotation marks omitted). In legal terms, a grant is "[a]n agreement that

creates a right or interest in favor of a person or that effects a transfer of a right or interest from one person to another." *Grant*, Black's Law Dictionary (11th ed. 2019). This does not mean, however, that any governmental agreement or transfer creating a right or interest in another person's favor is entitled to protection under Section 525(a). Instead, pursuant to the canon of construction *noscitur a sociis*, the words "other" and "similar" restrict the scope of protected grants to only those that conceivably resemble the other listed terms in the statute—licenses, permits, charters, and franchises. *See Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 604 (2d Cir. 2021) (stating that *noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated" (internal quotation marks omitted)). Although the exact nature of this resemblance is not articulated in the statute, the plain language of the terms, as well as our precedent, suggest that these interests all share two common qualities: they are (1) "unobtainable from the private sector" and (2) "essential to a debtor's fresh start." *Stoltz v. Brattleboro Hous. Auth. (In re Stoltz)*, 315 F.3d 80, 90 (2d Cir. 2002).

Thus, two things are clear from this analysis of the statute's plain language. First, given the textual limitations on the listed items in the statute, it is evident that credit guarantees—in other words, loans—are *not* covered by the provision.

As we held in *Goldrich*, "[a] credit guarantee is not a license, permit, charter or franchise; nor is it in any way similar to those grants. . . . Although the exact scope of the items enumerated may be undefined, the fact that the list is composed solely of benefits conferred by the state that are unrelated to credit is unambiguous." 771 F.2d at 30. Second, the text makes plain that it is insufficient for an item to fall within the general definition of "grant" to qualify for protection under Section 525(a). Instead, protection is only extended to those governmental grants that possess the two qualities we have identified as shared among the other listed terms. *See Stoltz*, 315 F.3d at 90. Before we can apply these two principles to the PPP, however, we must address in more detail the parties' dispute over our precedent regarding the scope of Section 525(a), including Springfield's contention that *Goldrich* is no longer good law.

B. ***Our Precedent***

The parties dispute which of our two Section 525(a) cases—*Goldrich* or *Stoltz*—controls the instant issue. The bankruptcy court described these cases as presenting "markedly different analyses of [Section] 525(a)" and ultimately concluded that *Stoltz* marked our clear "departure from—and disproval of" our earlier analysis in *Goldrich*. Special App'x at 13, 17. We disagree.

Section 525 evolved from *Perez v. Campbell*, 402 U.S. 637 (1971), a bankruptcy case in which the Supreme Court held that a state law conditioning the reinstatement of a driver's license on the repayment of a debt—despite that debt having been discharged in bankruptcy—conflicted with the Bankruptcy Code's "policy of a fresh start for a debtor." S. Rep. No. 95-989, at 81 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5867; *see also Goldrich*, 771 F.2d at 30 (recognizing Congress's codification of *Perez*); *Stoltz*, 315 F.3d at 87 (same). Notwithstanding this "fresh start" policy, when we first examined Section 525 in *Goldrich*, we held that the provision did not extend so far as to cover a New York student loan guaranty program. *Goldrich*, 771 F.2d at 30. In reaching this holding, we relied upon the provision's plain language, reasoning that "[h]ad Congress intended to extend this section to cover loans or other forms of credit, it could have included some term that would have supported such an extension." *Id.* Thus, we concluded that "Congress' failure to manifest any intention to include items of a distinctly different character" was unambiguous. *Id.* Further, we noted that, although the legislative history could be interpreted to "allow expansion" of Section 525(a), that same legislative history also indicated "that such expansion would be limited to situations sufficiently similar to *Perez* to fall within the enumeration," and,

accordingly, we refused to stretch Section 525(a) "so far beyond the limits set by Congress."[20] *See id.* at 30–31. Our reasoning was soon adopted by two other circuit courts, which likewise concluded that Section 525 did not cover loans or other programs dissimilar to the enumerated items. *See Watts v. Pa. Hous. Fin. Co.*, 876 F.2d 1090, 1093–94 (3d Cir. 1989) (holding that the unambiguous text of Section 525 did not cover an emergency mortgage assistance loan); *In re Exquisito Servs., Inc.*, 823 F.2d 151, 153–154 (5th Cir. 1987) (adopting the "narrow construction" of Section 525(a) outlined in *Goldrich* to limit the provision "only to situations analogous to those enumerated in the statute").

Nine years after our decision in *Goldrich*, Congress amended Section 525 to include a subsection prohibiting discrimination against debtor-borrowers by any "governmental unit that operates a student grant or loan program." 11 U.S.C. § 525(c). Notably, however, Congress left the plain text of Section 525(a) untouched. Following this amendment, multiple circuits continued to follow *Goldrich*'s reasoning, concluding that the amendment had narrowly abrogated *Goldrich's* specific holding as to *student* loans but had not abrogated its broader

[20] In *Goldrich*, we recognized that there was no need to examine Section 525's legislative history, given our determination that the statute was unambiguous. *Id.* at 30. However, as the lower court relied heavily on legislative history in reaching its conclusion that the provision *did* cover student loans, we were prompted to comment upon it. *Id.*

holding that Section 525(a) did not cover loans in general. *See Ayes v. U.S. Dep't of Veterans Affs.*, 473 F.3d 104, 109–11 (4th Cir. 2006) (holding that a veteran home-loan guaranty entitlement is not an "other similar grant" under § 525(a) and stating that, although Section 525(c) "clearly abrogated *Goldrich's* specific holding[,] . . . [t]here is, however, no indication in the language of [Section] 525(c) that Congress also intended the section to apply to other kinds of loan guaranties besides those of the student loan variety"); *Toth v. Mich. State Hous. Dev. Auth.*, 136 F.3d 477, 479–80 (6th Cir. 1998) (holding that a government home improvement loan is not covered by Section 525(a) and agreeing that, even after the enactment of Section 525(c), the statutory provision "[does] not prohibit consideration of prior bankruptcies in credit decisions, since 'the language of section 525 may not properly be stretched so far beyond its plain terms'" (quoting *Goldrich*, 771 F.2d at 29)).

When we next considered the scope of Section 525(a) in *Stoltz*, we concluded that a public housing lease qualified as a "similar grant," reasoning that it shared the two common qualities as the other items listed in the statute: first, it was, by definition, unobtainable in the private sector, and second, it was essential to a debtor-tenant's fresh start, as without it the debtor could "quite possibly become

homeless." *Stoltz*, 315 F.3d at 90. Although we relied upon the plain text of the statute in reaching our conclusion, as in *Goldrich*, we also briefly noted that the legislative history supported our reasoning, as portions of that history "specifically reject[] a narrow construction of the antidiscrimination provision and make[] clear that 525(a) protects the debtor's fresh start." *Id*. at 92 n.6.

Notwithstanding the ability to harmonize the analysis in these two decisions, the bankruptcy court determined—and Springfield argues on appeal—that *Goldrich* no longer carries authoritative weight because it was, alternatively, abrogated by congressional enactment or overruled by our subsequent opinion in *Stoltz*. We find these arguments unpersuasive and address each in turn.

First, although we recognized in *Stoltz* that Section 525(c) abrogated *Goldrich*'s specific holding as to student loans, we do not conclude that this abrogation nullified the rest of *Goldrich*'s analysis. For one thing, the plain text of Section 525(a) counsels against this conclusion. If Congress had intended Section 525 to reach all government loans, it could easily have revised Section 525(a) to do so. It did not. Instead, Congress enacted the ban on student loan discrimination as a separate section, Section 525(c), and left the text of Section 525(a) untouched. That Congress chose instead to amend the statute to cover student loans only, and

no other loans, strongly suggests that other loans are not protected by Section 525(a) and that Congress made the deliberate choice to exclude them. *See Conn. Nat'l Bank*, 503 U.S. at 253–54 ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *cf. United States v. City of New York*, 359 F.3d 83, 98 (2d Cir. 2004) (applying the maxim *expressio unius est exclusio alterius*—the mention of one thing implies the exclusion of another—"when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded" (internal quotation marks omitted)). Other circuit courts have reached a similar conclusion and have continued to hold—even after the enactment of Section 525(c), which gave protection to debtors for student loans under Section 525(a)—that other extensions of credit are plainly outside the ambit of Section 525(a). *See, e.g.*, *Ayes*, 473 F.3d at 109–11 (describing *Goldrich* as the "lodestar in the [Section] 525(a) context"); *Toth*, 136 F.3d at 479–80 (adopting *Goldrich*'s reasoning).

Second, we disagree with the bankruptcy court's conclusion that *Stoltz* departed from *Goldrich*'s analysis. To start, *Stoltz* could not have overruled *Goldrich* even had it presumed to do so, as a subsequent panel "is bound by the

decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) (internal quotation marks omitted). Moreover, nothing about the two decisions suggests that they are irreconcilable. In *Goldrich*, we addressed Section 525(a)'s applicability to loans; in *Stoltz*, we considered its applicability in the context of public housing. That we reached different answers regarding the scope of Section 525(a) does not mean that our respective analyses contradict each other—it simply means that we were asked the legal question in two different factual contexts and, accordingly, reached different conclusions. *Stoltz* scarcely engages with *Goldrich*, much less purports to overrule it, because of the starkly different factual contexts presented by each case—that is, the public housing lease in *Stoltz* bore no resemblance to the student loan in *Goldrich*. Thus, although the bankruptcy court suggests that *Stoltz's* limited treatment of *Goldrich* proves our rejection of the earlier case, the natural conclusion is, in fact, much simpler—in *Stoltz*, we did not engage with *Goldrich* because we did not need to.

Further, the bankruptcy court's reliance upon *Stoltz*'s brief analysis of the statute's legislative history as signaling our departure from *Goldrich*—an argument that Springfield also wields to argue that Section 525(a) should be read broadly—

is misplaced. We emphasize that a court may engage with legislative history only when the plain meaning of a provision is ambiguous. Although when there is a statutory ambiguity we may "consult legislative history . . . to discern Congress's meaning," *Chai v. Comm'r of Internal Revenue*, 851 F.3d 190, 218–19 (2d Cir. 2017) (internal quotation marks omitted), "[w]here the statutory language provides a clear answer, [our analysis] ends there," *id.* at 217 (internal quotation marks omitted). Here, because the statutory language is unambiguous, any reliance on legislative history to reach a contrary result is precluded. *See Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous." (internal citations omitted)); *see also Watts*, 86 F.3d at 1093 (noting the "obvious difficulty" with the argument that the legislative history reveals that "a narrow interpretation of section 525 would defeat its purpose . . . is that when an unambiguous statute is interpreted to mean what it says, the interpretation is not narrow"); *Ayes*, 473 F.3d at 111 ("[B]ecause § 525(a) is unambiguous, our interpretation is not 'narrow,' but instead succinctly correct.").

In any event, the legislative history is not as dispositive as the bankruptcy court or Springfield would have it. To be sure, as both *Stoltz* and the bankruptcy court pointed out, the legislative history of Section 525(a) describes the provision as "not exhaustive" and states that it "permits further development to prohibit actions by governmental . . . organizations or quasi-governmental organizations that perform licensing functions, . . . or by other organizations that can seriously affect the debtor's livelihood." H. Rep. No. 95-595, at 367 (1977), as *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 95-989, at 81, as *reprinted in* 1978 U.S.C.C.A.N. at 5866; *see Stoltz*, 315 F.3d at 92 n.6 (quoting House Report). However, this same passage also specifies that Section 525(a) applies only to *certain* types of governmental organizations and does not create a blanket prohibition on bankruptcy discrimination, specifically noting that Congress rejected just such a blanket prohibition. *See* S. Rep. No. 95-989, at 81, as *reprinted in* 1978 U.S.C.C.A.N. at 5866 ("The section is not so broad as a comparable section proposed by the Bankruptcy Commission, which would have extended the prohibition to any discrimination, even by private parties." (internal citation omitted)). Moreover, the legislative history also notes that Section 525(a) "does not prohibit consideration of other factors, such as future financial responsibility or ability, and

does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily." *Id.* At a minimum, the legislative history can be used to support either a broad or narrow reading of Section 525(a) and therefore does not provide clear insight into the intended scope of Section 525(a). Thus, even assuming, *arguendo*, that the statute was ambiguous (which it is not), the legislative history provides little assistance for interpreting the scope of Section 525(a) in this context. *Cf. Gayle*, 342 F.3d at 93–94 (stating that, although we may consider legislative history in the event of a statutory ambiguity, it is "equally important" that there "exist[] authoritative legislative history that assists in discerning what Congress actually meant").

In sum, neither Congress's enactment of Section 525(c) nor our decision in *Stoltz* disturbed *Goldrich's* fundamental holding, which we reaffirm here, that the plain text of Section 525(a) does not cover loan programs. Accordingly, our analysis turns to whether the PPP is properly classified under Section 525(a) as a "loan" or as an "other similar grant."

C. ***PPP is a Loan Program Uncovered by Section 525(a)***

The bankruptcy court concluded that the PPP, "[w]hile nominally designated as a 'loan,'" was, in substance, a "grant or support program[] aimed at

helping people in financial distress" due to the PPP's forgiveness mechanism and lack of underwriting. Special App'x at 19. We disagree and conclude that the PPP is, in substance and in form, a loan program that is not covered under Section 525(a).

Although we recognize that we must analyze the substance of the PPP, rather than just its nomenclature, it is nevertheless significant that Congress chose to characterize the PPP as a "loan" in the CARES Act. Indeed, the CARES Act uses the word "loan" approximately 75 times when describing the PPP. *See Tradeways, Ltd.*, 2020 WL 3447767, at *17 ("In total, the word 'loan' appears some 75 times in the CARES Act provisions establishing the PPP. The takeaway is clear: the $659 billion disbursed to borrowers through the PPP are loans, not grants."). For instance, as just a small sample, the CARES Act authorizes the SBA to "guarantee covered loans" issued pursuant to the PPP, 15 U.S.C. § 636(a)(36)(B), directs the SBA to "register the loan" no less than 15 days after "the date on which a loan is made," *id.* § 636(a)(36)(C), refers to the maximum amount of PPP that can be received as a "[m]aximum loan amount," *id.* § 636(a)(36)(E), and describes lenders as employing the SBA's authority to "make and approve covered loans," *id.* § 636(a)(F)(ii)(I). Classifying the PPP as a grant program, rather than a loan

program, thus directly contradicts the references to it as a loan in the CARES Act. *See Conn. Nat'l Bank*, 503 U.S. at 253–54.

To be sure, if the PPP truly operated as a grant, its mere designation as a "loan" in the CARES Act would not prevent us from classifying it as a "grant" for purposes of Section 525(a). However, that is not the case here. Instead, the substance of the PPP conclusively demonstrates that it is, as described, a loan guaranty program, not a grant program.

First, the structure of the PPP provides compelling support for our conclusion. As discussed above, Congress placed the PPP within Section 7(a) of the Small Business Act—the SBA's primary mechanism for providing financial assistance to businesses—and authorized the SBA to adopt the "same terms, conditions, and processes" for PPP loans as for 7(a) loans. 15 U.S.C. § 636(a)(36)(B); *see Pharaohs*, 990 F.3d at 224. Further, consistent with the SBA's standard loan practices, "PPP loans are made through private lenders and participants sign promissory notes, subject to SBA guarantees." *Schuessler*, 2020 WL 2621186, at *9; *see* 11 U.S.C. § 636(a)(36)(F)(ii)(II); 85 Fed. Reg. at 23,450–51. Additionally, PPP loans share several other common loan features, including set interest rates, maturation dates, refinancing terms, and deferral mechanisms. *See, e.g.*, 11 U.S.C.

§ 636(a)(36)(L)–(M); 85 Fed. Reg. at 20,811, 20,813–14.

Second, the forgiveness mechanism upon which Springfield's argument so heavily relies does not automatically convert PPP funds from loans into grants. For one thing, forgiveness is neither automatic nor guaranteed. A borrower must apply for forgiveness, which will only be granted if specified criteria are met, *see* 11 U.S.C. § 636m(b)–(d), and the CARES Act places several additional conditions upon obtaining forgiveness. For example, funds are not forgivable if the employer does not spend a minimum amount of the loan directly on payroll expenses, *id.* § 636m(d)(8), and the potential forgivable amount is reduced if employee salaries are decreased by more than 25%, *id*. § 636m(d)(3)(A). Further, if the loans are not used for statutorily authorized purposes—which do not fully overlap with all statutorily *permissible uses*—the loans must be repaid in full to the private lender. *See* 85 Fed. Reg. at 20,814. Moreover, the PPP's forgiveness mechanism is not especially unique, as there are other federal loan programs that allow debtors to obtain forgiveness under certain criteria. *See, e.g.*, 20 U.S.C. § 1087e(m)(1) (Public Service Loan Forgiveness Program); 20 U.S.C. § 1087j(b) (Teacher Loan Forgiveness Program). In short, the mere existence of a forgiveness option does not turn the PPP into a grant of "free money," as the bankruptcy court

characterized it. Special App'x at 20. A forgiveness option, favorable as it is, cannot alter the structure of what a loan forgiveness program fundamentally is—namely, a program to forgive *loans*.

Third, although Springfield argues that the SBA "conducts no review for creditworthiness or to determine 'sound value' of applications," Appellee Springfield's Br. at 37, and although the bankruptcy court concluded that the "lack of any underwriting" indicated that the PPP does not issue true "loans," *see* Special App'x at 19, these arguments again disregard the plain language of the CARES Act. The Act explicitly preserves Section 7(a)'s "sound value" requirement for all PPP loans. *See* 15 U.S.C. § 636(a)(6) ("All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment."); *see also In re Gateway Radiology*, 983 F.3d at 1257 ("Congress knew how to suspend or render inapplicable to PPP loans the traditional § 7(a) requirements when it wanted to do so, and it did that with some of the requirements. But not the sound value requirement."). Moreover, PPP funds are not distributed without any risk-mitigation mechanisms or any expectation of repayment. PPP loans are structured with explicit risk-management features, such as the promissory note requirement, as well as features that expressly contemplate repayment, such as set interest rates,

maturation dates, and deferral mechanisms. *See* 85 Fed. Reg. at 20,811, 20,813–14; 85 Fed. Reg. at 23,450–51. Further, the SBA's decision to bar bankrupt debtors from receiving these loans is itself a means of screening for creditworthiness. *See* 85 Fed. Reg. at 23,451 ("The Administrator, in consultation with the Secretary [of the Treasury], determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans."). In short, the streamlined underwriting and credit assessment processes for the PPP loans, taken in the context of the program's other features, do not convert PPP loans into grants. Instead, these streamlined processes represent deliberate choices made to best distribute much-needed loans quickly and efficiently in the middle of a pandemic. *See, e.g.*, 85 Fed. Reg. at 20,811 ("The intent of the [CARES] Act is that SBA provide relief to America's small businesses expeditiously."); *id.* at 20,811–20,812 ("The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency."). Where Congress has deliberately designed what is plainly a loan program under the CARES Act, we cannot controvert its clear intent and re-classify the PPP as a "grant" program for purposes of Section 525(a).

The bankruptcy court, however, determined that the PPP is an "other

similar grant" protected by Section 525(a) because: (1) the PPP's favorable terms "confer unique benefits impossible to obtain from the private sector;" and (2) would "seriously affect [Springfield's] ability to continue business operations and successfully reorganize," which it concluded was essential to Springfield's fresh start. Special App'x at 20 (internal quotation marks omitted). In so doing, the bankruptcy court relied on a strained analogy to the public housing lease at issue in *Stoltz* that we conclude is inapposite.

Stoltz, in analyzing the parameters of Section 525(a), focused its analysis on a specific set of government-issued property interests that relate to an individual's ability to access or pursue their livelihood: "[a] debtor who cannot obtain her real estate license will be unable to pursue her chosen profession; a debtor who cannot obtain his transcript will be unable to apply for certain jobs or further schooling; a debtor who cannot obtain a driver's license will be unable to commute to many jobs or school." *Stoltz*, 315 F.3d at 90. As the Sixth Circuit explained, the items enumerated in Section 525(a) implicate the "government's role as a gatekeeper in determining who may pursue certain livelihoods," *Toth*, 136 F.3d at 480, and, as the Fourth Circuit noted, "are all governmental authorizations that typically permit an individual to pursue some occupation or endeavor aimed at economic

betterment," *Ayes*, 473 F.3d at 108.[21] The public housing lease in *Stoltz* clearly fit within these interests; individuals qualify for a public housing lease because they cannot afford privately available housing and, thus, the lease could only be obtained from the government. *See Stoltz*, 315 F.3d at 90. Further, the denial of a lease could lead to eviction or homelessness, making the lease essential to the debtor's future. *See id.*

When applied to the PPP, this analogy breaks down. If a governmental entity refuses to issue a professional license to a debtor, that debtor is unequivocally denied entry into that profession. But if a governmental entity refuses to guarantee a PPP loan for a debtor, that debtor is not unequivocally excluded from receiving capital from other sources. Ineligible debtors can still seek traditional loans from a bank (even if private commercial loans would not carry the same generous terms as PPP loans) or can receive other governmental support grants as, in fact, Springfield did. Although the denial of a PPP loan may inhibit a would-be borrower's ability to access capital, that rejection does not bar

[21] The Fourth Circuit noted that this understanding also reconciles any potential tension between the student loans at issue in *Goldrich* (now protected under Section 525(c)) and other, unprotected loans, stating that, "[b]ecause education is often crucial to securing employment, [Section] 525(c)'s prohibition against discrimination in the granting of student loan guaranties to bankrupts is consistent with [Section] 525's goal of allowing former debtors in bankruptcy to earn a living." *Ayes*, 473 F.3d at 110 n.6.

borrowers from operating their businesses or prevent them from pursuing their chosen profession.

In short, the PPP loans, by their nature, do not share the "common qualities of the property interests protected under section 525(a)" as identified in *Stoltz*—that is, such loans are not "property interests unobtainable from the private sector and essential to a debtor's fresh start." 315 F.3d at 90*; see also In re Vestavia Hills, Ltd.*, 630 B.R. at 849 ("[T]he inability to receive [PPP funds] does not foreclose the person or entity from engaging their chosen livelihood, as the inability to obtain a license to operate or a business charter would."); *Tradeways*, 2020 WL 3447767, at *19 ("Unlike the denial of a medical license or a building permit, the rejection of a borrower's PPP application does not completely foreclose the borrower from legally pursuing a career. To the contrary, the borrower remains uninhibited to conduct business." (internal citations, quotation marks, and alterations omitted)); *In re Penobscot Valley Hosp.*, 2020 WL 3032939, at *14 (concluding that "[t]he exclusion of persons involved in bankruptcy from the PPP does not conflict with the fresh start or otherwise frustrate the operation of the Bankruptcy Code" as "the exclusion . . . is not similar to denying a debtor a license to operate in his chosen field and thereby denying the debtor the opportunity to pursue economic

betterment"); *Henry Anesthesia Assocs.*, 2020 WL 3002124, at *7 ("Through the PPP, the government agrees to guarantee loans for eligible borrowers, and agrees to forgive those loans if certain conditions are met. However, no legislative authority is required to contract for a loan, a loan guarantee, or even forgiveness of a loan, and all of these transactions can be obtained in the private market.").

In sum, we recognize the economic hardships caused by the COVID-19 pandemic to businesses like Springfield, as well as the undoubted usefulness of additional governmental aid in continuing Springfield's operations and allowing it to provide necessary medical services to the community. However, our understanding of the economic realities facing businesses in a pandemic cannot controvert the plain language of the Section 525(a) or our binding precedent in *Goldrich* that reinforces the meaning of that plain language.

D. *Subsequent Legislation*

Although our conclusion relies on the plain text of the statute, we note that the additional PPP legislation enacted after the CARES Act provides further support for our interpretation of Section 525(a). We have emphasized the need to approach post-enactment legislation with caution. *See In re Clinton Nurseries, Inc.*, 998 F.3d 56, 66 n.9 (2d Cir. 2021). However, in this particular instance, Congress's

subsequent legislation supports its clear intent that PPP loans are not covered by Section 525(a).

In the Consolidated Appropriations Act, 2021, Congress amended Section 525 to expressly bar discrimination based on bankruptcy status in the provisioning of certain CARES Act benefits—such as foreclosure moratoriums, 15 U.S.C. § 9056, forbearance of certain residential mortgages, *id.* § 9057, and eviction moratoriums, *id.* § 9058—but notably did *not* include PPP loans in this amendment, *see* 11 U.S.C. § 525(d) ("A person may not be denied relief under sections 4022 through 4024 of the CARES Act (15 U.S.C. 9056, 9057, 9058) because the person is or has been a debtor under this title."), *repealed by* Consolidated Appropriations Act, 2021, Pub. L. 116-260, Div. FF, Title X § 1001(c)(2), 134 Stat. 3217 (Dec. 27, 2020).[22] The SBA argues that the clear negative inference from this amendment is that other provisions of the CARES Act are *not* covered by Section 525(a). We agree. As discussed above, "[w]e presume that Congress legislates against the backdrop of existing law." *Pharaohs*, 990 F.3d at 227 (citing *Garcia v. Teitler*, 443 F.3d 202, 207 (2d Cir. 2006)). Congress's amendment of Section 525 to include some provisions

[22] The Consolidated Appropriations Act, 2021, contained a sunset provision providing that subsection (d) of Section 525 would be automatically repealed one year after the date of enactment—*i.e.*, on December 27, 2021.

of the CARES Act, but not others, allows us to draw the clear inference that Congress decided *not* to extend the provision's protections to any portion of the Act other than those expressly identified in the new Section 525(d). *See Pharaohs*, 990 F.3d at 227 (concluding that Congress's modification of a longstanding rule under Section 7(a) to include some types of businesses but exclude others "strongly suggest[ed] that Congress deliberately chose not to change the Administrator's statutory discretion to exclude businesses, other than those it expressly identified in the CARES Act").

Moreover, as part of the Consolidated Appropriations Act, 2021, Congress enacted the Economic Aid Act, creating a "process through which the SBA Administrator can issue a written determination that will render certain entities in bankruptcy eligible for PPP loans." Appellant SBA's Br. at 28 (citing Economic Aid Act § 320(a), (f), 134 Stat. at 2015–16). If we were to read Section 525(a) as covering PPP loans—if we were to assume all bankrupt debtors were already protected from discrimination *without* requiring approval from the Administrator—this provision would be unnecessary. *See Tablie v. Gonzales*, 471 F.3d 60, 64 (2d Cir. 2006) ("We are obliged to give effect, if possible, to every clause

and word of a statute, and to render none superfluous." (internal quotation marks and alterations omitted)).

Insofar as Springfield argues that this subsequent legislation merely reflects Congress's choice not to definitively speak on the issue and instead allow the courts to determine the scope of Section 525(a), we disagree. It is clear that Congress *did* definitively speak on the matter, first, by designating the PPP as loans and placing them within Section 7(a) and second, by extending Section 525's protections to only certain CARES Act provisions, and not the PPP. This conclusion is especially apparent given that prior to these amendments, as discussed above, the overwhelming majority of federal courts to address the issue concluded that Section 525(a) does not cover PPP loans. If that interpretation of Section 525(a) were truly antithetical to Congress's wishes, as Springfield suggests, it would seem strange to conclude that Congress amended Section 525 but did not make its intended construction clear, all to deliberately allow federal courts to continue reaching what Congress viewed as the wrong conclusion. Had Congress intended Section 525(a) to apply to PPP loan guarantees, it would have expressly stated so in the Consolidated Appropriations Act in 2021, as it did with other

CARES Act sections and as it did previously with student loans in enacting Section 525(c) after *Goldrich*.

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In sum, we conclude that the PPP is a loan guaranty program and not an "other similar grant," and we hold that Section 525(a) does not apply to PPP loans. Accordingly, the bankruptcy court incorrectly ruled that Springfield was entitled to summary judgment and we instead conclude, as a matter of law, that summary judgment in SBA's favor is warranted on the Section 525(a) claim. Moreover, because the bankruptcy court's decision to issue a permanent injunction rested on that same error of law, we conclude that the injunction against the SBA should be vacated. *See ACORN*, 618 F.3d at 133. Accordingly, we need not, and do not, decide whether Section 634(b)(1) renders the SBA immune from injunctive relief.

CONCLUSION

For the reasons set forth above, we **REVERSE** the judgment, **VACATE** the permanent injunction, and **REMAND** to the bankruptcy court for further proceedings consistent with this opinion.

Applicant Details

First Name	**Luke**
Last Name	**Ross**
Citizenship Status	**U. S. Citizen**
Email Address	**lwr2110@columbia.edu**
Address	**Address** Street **44 West 69th Street #3B** City **New York** State/Territory **New York** Zip **10023** Country **United States**
Contact Phone Number	**6463881487**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**December 2015**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 10, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

McCrary, Justin
jrm54@columbia.edu
Fagan, Jeffrey
jeffrey.fagan@law.columbia.edu
212-854-2624
Bobbitt, Philip
bobbitt@law.columbia.edu
212-854-4090

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Luke Ross
44 W. 69th Street #3B
New York, NY 10023
(646) 388-1487
lwr2110@columbia.edu

May 5th, 2022

The Honorable Kenneth M. Karas
United States District Court
Southern District of New York
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601

Dear Judge Karas:

I am a third-year student at Columbia Law School writing to apply for a clerkship in your chambers beginning in 2024. As a native New Yorker interested in serving as an Assistant U.S. Attorney, I find the prospect of serving as your law clerk particularly appealing. I also believe my litigation experience at Analysis Group, upcoming work at Sullivan & Cromwell, and passion for legal analysis and writing leave me well-prepared for a district court clerkship.

Enclosed please find my resume, transcript, writing sample, and letters of recommendation from Professors Bobbitt (212 854-4090, pbobbi@columbia.edu), Fagan (212 854-2624, jaf45@columbia.edu), and McCrary (212 854-7992, jmccrary@columbia.edu). Please also see the following link to my newsletter where I summarize and comment upon recent decisions of the First, Second, and Third Circuit Courts of Appeals (https://circuitbreaker.substack.com).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Luke Ross

Luke Ross

LUKE ROSS

44 West 69th Street #3B
New York, NY 10023
(646) 388-1487 • lwr2110@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2022
Honors: Hamilton Fellowship (full-tuition scholarship)
James Kent Scholar, Harlan Fiske Stone Scholar
Activities: *Columbia Business Law Review*, Articles Editor
Extern at Squire Patton Boggs' Public Service Initiative, Capital Litigation (2021-2022)
Teaching Assistant for Professor Justin McCrary, Antitrust (Spring 2022)
Teaching Assistant for Professor Robin Effron, Civil Procedure (Fall 2020)
Academic Coach, Civil Procedure, Constitutional Law, and Property (2020-2022)

Washington University, St. Louis, MO
B.A. in Political Science (College Honors), received Dec. 2015
Honors: Phi Beta Kappa
Arnold J. Lien Prize (Outstanding Senior in Political Science)
Activities: Varsity Club Golf
Study Abroad: King's College London, London, UK, Spring 2015 (recipient of Excellence Scholarship)

EXPERIENCE

Sullivan & Cromwell, New York, NY
Summer Associate Summer 2021
Accepted offer to return as litigation associate in fall 2022.

Balestriere Fariello, New York, NY
Legal Apprentice Summer 2020
Wrote complaints alleging breaches of fiduciary duty by directors of several Fortune 500 companies and alleging self-dealing by broker-dealers at a wealth management firm. Attended depositions and analyzed and organized discovery documents for complex litigation matters. Conducted legal research regarding several state and federal law questions, including employer exposure to COVID-related litigation and the applicability of the California franchise tax to business conducted out-of-state.

Analysis Group, Inc., Boston, MA
Senior Analyst July 2018 – July 2019
Developed individualized inquiry arguments to assert the prevalence of uninjured class members in several proposed plaintiff classes. Analyzed and rebutted plaintiffs' damages models in generic product-hop litigations. Served as a formal mentor to a group of incoming analysts and co-developed an analyst training program in report drafting and formatting.

Analyst June 2016 – July 2018
Conducted quantitative and qualitative economic analyses to support experts in complex litigation. Performed analyses of the anticompetitive nature of the U.S. health insurance market in support of a Justice Department motion to block a merger between two national health insurers. Developed estimates of market share of non-oncology products based on user inputs related to their clinical and order-of-entry attributes.

INTERESTS: Fiction and legal writing, golf, tennis, and chess

Columbia
Law School

Registration Services

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CLS TRANSCRIPT (Unofficial)

02/02/2022 03:20:09

Program: Juris Doctor

Luke W Ross

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6635-2	Columbia Business Law Review Editorial Board		1.0	
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	
L6474-1	Law of the Political Process	Greene, Jamal	3.0	
L8868-1	S. The American Bail System	Funk, Kellen Richard	2.0	
L6822-1	Teaching Fellows	McCrary, Justin	3.0	

Total Registered Points: 12.0

Total Earned Points: 0.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6635-2	Columbia Business Law Review Editorial Board		1.0	CR
L6791-1	Ex. Constitutional Rights in Life and Death Penalty Cases	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	A
L6791-2	Ex. Constitutional Rights in Life and Death Penalty Cases - Fieldwork	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	CR
L6425-1	Federal Courts	Kent, Andrew	4.0	A
L8082-1	S. American Jurisprudence: Judicial Interpretation and The Role of Courts [Minor Writing Credit - Earned]	Sullivan, Richard	2.0	A-

Total Registered Points: 11.0

Total Earned Points: 11.0

UNOFFICIAL

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6502-1	Advanced Criminal Law: The Death Penalty	Fagan, Jeffrey A.	3.0	A-
L6635-1	Columbia Business Law Review		0.0	CR
L6231-2	Corporations	McCrary, Justin	4.0	A-
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6274-3	Professional Responsibility	Gupta, Anjum	2.0	A-
L6683-1	Supervised Research Paper	Khan, Lina	1.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	McCrary, Justin	3.0	A+
L6635-1	Columbia Business Law Review		0.0	CR
L9281-1	Constitutional Interpretation	Bobbitt, Philip C.	4.0	A
L6169-2	Legislation and Regulation	Kessler, Jeremy	4.0	A-
L6675-1	Major Writing Credit	Khan, Lina	0.0	CR
L6683-1	Supervised Research Paper	Khan, Lina	2.0	A
L6822-1	Teaching Fellows	Effron, Robin	3.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6410-1	Constitution and Foreign Affairs	Damrosch, Lori Fisler	3.0	CR
L6133-3	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	CR
L6108-3	Criminal Law	Liebman, James S.	3.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-1	Legal Practice Workshop II	Harwood, Christopher B	1.0	CR
L6118-1	Torts	Blasi, Vincent	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.; Louk, David S	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

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Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	A
L6105-5	Contracts	Katz, Avery W.	4.0	B+
L6113-2	Legal Methods	Sovern, Michael I.	1.0	CR
L6115-1	Legal Practice Workshop I	Harwood, Christopher B; Neacsu, Dana	2.0	P
L6116-2	Property	Balganesh, Shyamkrishna	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 83.0

Total Earned JD Program Points: 71.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L
2019-20	Harlan Fiske Stone	1L

UNOFFICIAL

May 05, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

It is my pleasure to recommend Luke Ross as a judicial clerk. He has distinguished himself as an especially bright, curious, and well-rounded student and thinker. His performance in my Antitrust and Corporations classes speaks to his ability to grasp complex legal concepts, recognize nuance, and express his understanding in a clear and persuasive fashion. Luke is without a doubt one of the best students I have ever had in my Antitrust class, for which he received an "A+". He was an active participant in class panels and discussions and was always willing and able to help his classmates understand difficult concepts. He was also very enthusiastic about the course material and attended my office hours regularly to discuss contemporary issues in antitrust law. It was through his participation in my Antitrust class last fall and our lively discussions outside of the classroom that I came to know Luke.

Luke's work outside my classroom further demonstrates his unique strengths as a legal writer and researcher. His Note arguing for enhanced judicial scrutiny of antitrust consent decrees, which he sent to me for feedback, is written with the precision of a technician and the depth of thought of a serious intellect. In the Note, Luke demonstrates an incredible fluency with the details of the Tunney Act, its historical context, and its modern applications while nevertheless crafting a far-reaching argument capable of addressing fundamental disputes about the nature of public interest in antitrust law and the limits of judicial prerogative. It is also a great display of Luke's creativity. In the face of an ossified debate over whether to sacrifice the democratically mandated spirit of the Tunney Act or our Constitution's separation of powers, Luke innovated a unique version of the substantial evidence test that could be used to allow for the democratically mandated public interest reviews without requiring *de novo* review of consent decrees. Moreover, his final paper for Professor Bobbitt's Constitutional Interpretation class exemplifies his command of legal theory and sensitivity to the intricacies of judicial decision-making. I was particularly struck by his ability to simplify thorny theoretical concepts regarding the legitimacy of constitutional law as well as uncover similarities in what initially seem divergent approaches to adjudication. His strong analysis and passion for the subject matter are excellent signals of his potential as a judicial clerk, but beyond this Luke possesses a singular intellectual creativity and rigor that I believe will allow him to make important contributions to our legal system in the future.

In addition to his work as a law student, Luke's experiences as a litigation consultant and published fiction writer make him particularly well-suited for a judicial clerkship. During his three years at Analysis Group he assisted experts in testifying in complex, civil litigation by drafting expert briefs, deposition questions, and constructing economic analyses. In my office hours, he discussed with me a number of antitrust cases he worked on, including In re Asacol, a nationwide antitrust class-action, as well as on behalf of the DOJ to block the Anthem-Cigna health merger. I often testify as an expert witness in antitrust litigation and know through my own work at Cornerstone Research that the skills Luke acquired at Analysis Group will prepare him to hit the ground running as a judicial clerk. Finally, his passion for fiction-writing has undoubtedly served him well as a law student and will surely do so as a clerk. I've had the delight of reading some of his short stories in a literary journal called the Cadaverine. I was not surprised to find he had other creative outlets besides the law. He's an interesting, friendly and creative person who I'm sure will liven up any workplace.

Luke is the sort of law student who reminds his professors how to be passionate about the law. It has been a great pleasure to teach Luke and I look forward to seeing him flourish in his future career. I hope this letter has helped you to understand what a uniquely talented and capable individual Luke is and I would be happy to discuss his application with you further. I give Luke my full and enthusiastic recommendation. I have no doubts he will be a fantastic judicial clerk.

Sincerely,

Justin McCrary

Justin McCrary - jrm54@columbia.edu

Columbia Law School

May 05, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Re: ***Recommendation for Luke Ross***

Dear Judge Karas:

It's a pleasure to recommend Luke Ross for a clerkship in your chambers. Luke was my student in Spring 2021 in an advanced criminal law course on the death penalty. Luke excelled in the course. He was an intellectual leader in class. His interrogations of the material prompted other students (normally reticent) to engage in debate that challenged the historical trajectory of caselaw and pre-vailing Supreme Court doctrine. He skillfully argued both sides of controversial opinions, at times siding with dissenterds and at other times with a majority. His written exam included a Swiftian challenge to prevailing jurisprudence in the form of proposal for a sharp revision of doctrine to rescue the death penalty from what he characterizes as its inevitable demise. Intellectual depth and courage marked his recurring contributions to class discussion. It was a pleasure to teach him, to see a legal scholar growing over the course of the semester, and to engage with him in debate on difficult ques-tions.

Beyond our discussions in class, Luke was a regular visitor to (video) office hours to continue his en-gagement with the material. He pushed hard in those private conversations on the Court's dicta, and yet he was able to debate with himself (and me) on his own views. He incorporated empirical facts into his analysis of caselaw, often challenging what he saw as an inadequate engagement by the Court's engagement with those facts (His empirical skills shone in those instances). His analysis was sharp, informed, balanced, and clearly articulated as if he were arguing in Court. I can imagine the same approach to cases on your docket, with contributions that will challenge both sides of an argu-ment.

A few other comments on Luke. His record in his first four semesters of law school suggests that my colleagues saw the same legal capital that I did. His experience in litigation during summer place-ments suggests that he is more than comfortable with empirical evidence, which sets him apart from his colleagues. He is a poker player, a skill that may be valuable in the analysis of litigation and the contests in both trial and appellate law. He is a fine writer. His recognitions in our law school include a Stone Scholar recognition and a Hamilton Fellowship, both extremely competitive awards.

Not only is Luke one of the best students I have taught, he also is one of the most interesting and lik-able students I have encountered. He has my enthusiastic recommendation for a challenging and productive clerkship. Please feel free to contact me should you need additional perspective on his work and his skills.

Yours truly,

Jeffrey Fagan
Isidor and Seville Professor of Law
Professor of Epidemiology, Mailman School of Public Health

Jeffrey Fagan - jeffrey.fagan@law.columbia.edu - 212-854-2624

May 05, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I have been asked to write a letter of recommendation for Mr. Luke Ross. I am pleased and honored to do so.

Mr. Ross was my student in a Constitutional Interpretation class last fall. As I have written elsewhere, “it was a wonderful class, far exceeding my expectations for the Zoom experience and it had a number of ‘stars.’ There was never a quiet moment, I was often surprised by the insights of the students and it was a highly competitive environment.” Even in that class, Mr. Ross was exceptional. He is quiet and not particularly assertive and so I often “cold called” him with the most difficult questions. He was unfailingly on point with concise, razor sharp and impressive replies.

Now a student like that may not be the best thing for a small class; Mr. Ross’ answers were so correct and so definitive that they tended to shut down further discussion, but such a student will make an absolutely fabulous clerk and I recommend him highly to you.

Please do not hesitate to contact me directly if you would like me to elaborate on any of these points or answer any questions you may have.

With every good wish,

Philip Bobbitt
Herbert Wechsler Professor of Jurisprudence
Columbia University

Philip Bobbitt - bobbitt@law.columbia.edu - 212-854-4090

Note: I drafted this legal memorandum as petitioner's counsel in a federal habeas simulation organized by my seminar instructors.

Memorandum re: David Johnson's Ineffective Assistance of Counsel Challenges

This memo considers the merits of three ineffective assistance of counsel (IAC) claims in David Johnson's federal habeas petition. It assumes Johnson will succeed on his "gateway claim" of actual innocence and thus overcome procedural obstacles to district court review on the merits of his constitutional claims.[1] The memo will introduce potential arguments, review controlling precedent, and discuss the relative strength of each claim given the facts of Johnson's case.

Background on Johnson's IAC Challenges

Johnson has sought federal post-conviction relief on the ground he lacked adequate trial counsel in violation of the Fifth, Sixth, and Fourteenth Amendments. On direct appeal to the Alabama Court of Criminal Appeals, he linked the inadequacy of his counsel to Alabama's scheme for compensating attorneys appointed to represent the indigent, as set out in § 15-12-21, Code of Alabama 1975. He argued that the state's $1,000 cap on attorneys' fees in a capital case violated the Takings Clause of the Fifth Amendment, as applied to Alabama via the Fourteenth Amendment. Based on the opinions of the Court of Criminal Appeals, it is unclear whether Johnson properly raised a Sixth Amendment IAC challenge on either direct appeal or upon seeking state post-conviction relief.[2] However, this discussion proceeds under the assumption that the district court will reach the merits of his IAC claims.

[1] Schlup v. Delo, 513 U.S. 298, 315 (1995).
[2] If not, then Johnson would have to overcome the additional hurdle of showing his IAC claim is "substantial" and that state habeas counsel was "also ineffective in failing to raise the claim in his state habeas proceeding." Martinez v. Ryan, 566 U.S. 1 (2012); *see also* Trevino v. Thaler, 569 U.S. 413 (2013).

Summary of Potential Challenges

Johnson can raise two IAC claims with plausible chances of success. First, he can argue trial counsel failed to adequately investigate the facts of Ms. Gonzales' murder, the nature of the Birmingham Police Department's investigation, and his own abusive childhood. In doing so, he can appeal to his trial counsel's admission that Alabama's statutory fees for indigent counsel "left [him] unable to furnish real representation . . ."[3] Alternatively, he can argue his trial counsel failed to expend resources on expert testimony and other evidence gathering activities out of financial concerns, and, thus, provided constitutionally deficient counsel under *Hinton v. Alabama*. It is unlikely Johnson can succeed on an IAC claim centered solely on Alabama's underfunding of indigent defense counsel. Two district courts in the Eleventh Circuit have rejected such a challenge and the Supreme Court has never entertained an IAC claim grounded on systemic ineffectiveness due to inadequate resources.

Discussion

I. Strickland Framework and Modern Doctrine

In reviewing Johnson's IAC claims, the District Court for the Middle District of Alabama is bound to apply Supreme Court and Eleventh Circuit precedent. Under AEDPA, it will ask whether the Alabama state courts' rejection of Johnson's IAC claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[4] Under this deferential standard, the district court may disagree with yet uphold the state courts' rejection of Johnson's claims as "reasonable."[5] This

[3] Petitioner's Objections to the Report and Recommendations of the Magistrate Judge at 19, Johnson v. Ward, No. 2:07cv901-T (M.D. Ala. Jun. 28, 2010) [hereinafter "Petitioner's Objections"].
[4] Williams v. Taylor, 529 U.S. 362, 376 (2000).
[5] Woods v. Donald, 575 U.S. 312, 317 (2015).

remains the case even when the state court has failed to offer any explanation for its denial of an IAC claim.[6]

In *Strickland, v. Washington*, the Supreme Court set out a two-part test for adjudicating IAC claims. A defendant must show (1) that counsel's performance fell below an "objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[7]

The Court has held the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[8] In analyzing attorney performance, it has emphasized that any judicial evaluation must be "deferential" and take into account counsel's perception of the totality of circumstances.[9] As such, the district court is unlikely to second-guess trial counsel's strategic decisions. However, the Court in *Strickland* noted that death penalty counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[10] Over the last decade, nearly every successful IAC challenge at the Supreme Court has centered on a flawed pre-trial or pre-sentencing investigation. With that said, however, the Court has acknowledged the existence of cases in which trial counsel may be deemed ineffective for failing to pursue the "only reasonable and available defense strategy."[11]

Recent examples of constitutionally deficient performance include:

- Failing to investigate a defendant's family history, mental health background, and the facts serving as the basis for the state's case in aggravation; conducting a cursory investigation into the accuracy and usefulness of a mitigation witness's testimony;

[6] Harrington v. Richter, 562 U.S. 86, 98 (2011).
[7] Strickland v. Washington, 466 U.S. 668, 687 (1984).
[8] *Id.* at 688.
[9] Wiggins v. Smith, 539 U.S. 510, 522 (2003).
[10] *Strickland*, 466 U.S. at 688-89.
[11] *Harrington*, 562 U.S. at 106.

introducing aggravating evidence while eliciting mitigation testimony due to inadequate preparation.[12]

- Failing to contact or interview known individuals regarding defendant's abusive childhood; failing to contact counselors from a drug treatment program that defendant had attended; failure to give three of defendant's four penalty phase witnesses sufficient notice before calling them to testify in mitigation; failing to elicit more than "scattered" mitigating evidence from mitigation witnesses.[13]

- Failing to seek additional funds to hire an adequate expert when that failure was not based on "any strategic choice but on a mistaken belief that available funding was capped at $1,000."[14]

- Conducting a one-day long mitigation investigation, consisting only of interviews with witnesses suggested by the defendant's mother, and failing to uncover significant evidence of defendant's childhood abuse and mental impairment.[15]

- Meeting once with the defendant and failing to obtain any of his school, medical, or military service records or interview any family members prior to the penalty phase.[16]

- Failing to review defendant's prior conviction file, despite knowing prosecutors planned to use prior conviction as evidence in aggravation.[17]

It is important to note that the Eleventh Circuit and the District Court for the Middle District of Alabama grant significant leeway to trial counsel. The circuit often references the "doubly deferential" nature of habeas review of IAC claims.[18] Recently, it held that petitioner must prove that no fair-minded jurist could find that "competent counsel would have taken [or failed to take] the action that counsel did [or did not] take."[19] Furthermore, in a recent paradigmatic case, the district court applied § 2254(e)(1)'s "presumption of correctness" to trial counsel's failure to present any alibi witnesses, then held plaintiff had failed to rebut that presumption by "clear and

[12] Andrus v. Texas, 140 S. Ct. 1875, 1879 (2020).
[13] Maples v. Comm'r, Ala. Dep't of Corr., 729 Fed. Appx. 817, 824 (11th Cir. 2018).
[14] Hinton v. Alabama, 571 U.S. 263, 274 (2014).
[15] Sears v. Upton, 561 U.S. 945 (2010).
[16] Porter v. McCollum, 558 U.S. 30, 39 (2009).
[17] Rompilla v. Beard, 545 U.S. 374, 389 (2005).
[18] *See* Mills v. Comm'r, Ala. Dep't of Corr., No. 21-11534, 2021 WL 5107477, at *8 (11th Cir. Aug. 12, 2021); Wood v. Sec'y, Dep't of Corr., 793 Fed. Appx. 813, 817 (11th Cir. 2019); Downs v. Fla. Dep't of Corr., 738 F.3d 240, 257-58 (11th Cir. 2013).
[19] Thomas v. AG of Fla., 992 F.3d 1162, 1186-87 (11th Cir. 2021).

convincing evidence."[20] To support its application of that standard, the court cited to a case in which the Supreme Court explicitly refused to determine whether IAC claims should be reviewed under it.[21]

Assuming Johnson's counsel was constitutionally inadequate, the district court will turn to the question of prejudice. The Supreme Court has held that establishing prejudice under *Strickland* requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[22] Thus, the district court must ask whether there is a reasonable probability that, absent the errors of Johnson's trial counsel, "the factfinder would have had a reasonable doubt respecting [Johnson's] guilt [or suitability for death]."[23] However, the Court has interpreted AEDPA to limit prejudice to those instances in which every fair-minded jurist would agree a different outcome would have occurred given adequate counsel.[24] As such, in order to grant relief, the district court must find that no fair-minded jurist could reasonably believe Johnson would have been convicted and/or sentenced to death had he received constitutionally adequate counsel.

II. Johnson's Potential IAC Challenges

A. Trial Counsel Failed to Adequately Investigate

Johnson can argue his trial counsel failed to adequately investigate facts pertaining to the crime, the nature of the state's investigation, and Johnson's background and other mitigating factors. Based on my review of the record, Johnson's Objections to the Report and

[20] Boone v. Price, No. 2:15-cv-556-ECM, 2021 WL 4206618, at *10 (M.D. Ala. Sep. 15, 2021).
[21] *Id.* (citing Wood v. Allen, 558 U.S. 290, 301 (2010)).
[22] Hinton v. Alabama, 571 U.S. 263, 275 (2014).
[23] *Id.*
[24] Cullen v. Pinholster, 563 U.S. 170, 229 (2011).

Recommendations of the Magistrate Judge, and the Alabama Court of Criminal Appeals' opinion denying Johnson's direct appeal, I believe this is a plausible, yet difficult, path to relief.

Upon taking Johnson's case, trial counsel faced the following factual landscape. His client had confessed to committing a murder during a burglary in the company of three named accomplices. Johnson then pled not guilty and claimed his confession was untrue and coerced via illegal methods of questioning. Without that confession, the state lacked any objective evidence linking Johnson to the crime. In fact, the forensic evidence then available undermined the reliability of his confession.

The question is what a reasonable investigation would have looked like under those facts. Outside of basic steps, such as interviewing Johnson and his family members or seeking copies of forensic reports, controlling precedent as well as then-published ABA Guidelines suggest competent counsel should have done the following, at a minimum.

- Sought out persons mentioned in Johnson's statements to police for pre-trial and pre-sentencing interviews, including alleged accomplices, acquaintances, and the associate of Chris Calron who saw Richard Halstedder shortly before the murder.
- Sought out Ms. Gonzales' family members for pre-trial and pre-sentencing interviews, especially in light of the lack of forced entry and Johnson's statement that Chris Calron first identified the victim's house as a drinking location.
- Attempted to identify and interview persons with direct knowledge of the Birmingham Police Department's investigative practices.
- Considered securing an expert witness to review Johnson's confession and testify to its unreliability.

Because trial counsel took none of these steps, Johnson has a live claim that his investigation was constitutionally deficient. Moreover, trial counsel's admission to a "real personal conflict . . . affect[ing] [his] ability to deliver good lawyering and affect[ing] [Johnson's] rights to adequate counsel and a fair trial" speaks to the serious flaws in his pre-trial

and pre-sentencing investigations.[25] With that said, however, succeeding on an inadequate investigation claim is no easy task given the Eleventh Circuit is bound to engage in highly deferential review of attorney performance.

Johnson also has the burden of showing prejudice. That will require appealing to, at a minimum, the affidavits of the Gonzales family, Chris Calron's plea and allocution, and new expert analysis of Johnson's confession. Taken together, these may show an adequate investigation by Johnson's counsel would have unearthed facts connecting Richard Halstedder to the crime and uncovered the Birmingham Police Department's use of coercive interrogation techniques. Moreover, Johnson should argue that competent counsel would have contacted additional experts and sought independent forensic analysis to call into doubt the state's account of the murder.

In sum, there is enough to suggest competent trial counsel would have acquired powerful defense evidence following a reasonably thorough investigation. The information related to Richard Halstedder, coupled with the lack of forensic evidence, may itself have raised doubt in each juror's mind. As such, it is worth pursuing the failure to investigate claim, even if it is no guarantee of relief.

B. Failure to Seek Adequate Funding for Expert Witnesses and Evidence Gathering

Johnson can argue his trial counsel rendered inadequate assistance by failing to retain expert witnesses or fund other evidence gathering activities due to an unfounded concern over financial resources. In *Hinton v. Alabama*, the Supreme Court found an attorney's failure to seek additional funds to hire a proficient expert witness was constitutionally deficient in light of a statutory provision for state reimbursement "of any expenses reasonably incurred in such defense

[25] Petitioner's Objections at 5.

to be approved in advance by the trial court."[26] Johnson can thus contend that his trial counsel's concern over his own paltry attorney's fees resulted in a failure to fund a constitutionally adequate defense.

The similarities between the Hinton and Johnson cases are striking. Both involve murder convictions resting on a single type of evidence — ballistics evidence in Hinton's case and a confession in Johnson's. As such, a successful trial defense required "effectively rebutting" that evidence.[27] In addition, Johnson's and Hinton's trial counsel each voiced concerns with Alabama's funding statute and barely attempted to rebut the state's key evidence at trial. Moreover, Johnson, like Hinton, needed a competent expert witness to have any chance of convincing the trial court or jury of his innocence.

In *Hinton*, however, trial counsel admitted that his mistaken understanding of statutory requirements led him to retain and stick with an extremely ineffective expert witness.[28] It is not clear that Johnson's trial counsel worked under a similar misapprehension. Even so, that should not stand in the way of appealing to *Hinton*. For one, though the Court emphasized Hinton's counsel's "ignorance on a point of law,"[29] it is hard to see why his performance would be less deficient had he refused to seek additional funding due to anxieties over the speed of reimbursement or increased up-front costs. As such, Johnson may have a viable claim for deficient performance if he can show his trial counsel failed to expend resources on important elements of the defense due to his publicly-acknowledged financial concerns.

To show prejudice, Johnson must establish a "reasonable probability that [his] [trial counsel] would have hired an expert who [or engaged in other factfinding that] would have instilled in the

[26] Hinton v. Alabama, 571 U.S. 263, 274 (2014).
[27] *Id.* at 273.
[28] *Id.* at 268.
[29] *Id.* at 274.

jury a reasonable doubt as to Johnson's guilt [or suitability for death]" had he not been preoccupied by financial concerns.[30] Without additional facts, it is hard to say whether Johnson can meet that burden. If so, however, his challenge has merit and will be an important test of *Hinton's* scope.

C. Structural Deprivation of Effective Counsel Due to Inadequate Funding of Indigent Counsel

Johnson may argue that Alabama functionally deprived him of effective counsel via persistent underfunding of indigent counsel. The Supreme Court has acknowledged that "appointed counsel in death penalty cases [in Alabama] are . . undercompensated."[31] However, neither the Supreme Court nor the Eleventh Circuit has held that underfunding of indigent counsel is unconstitutional *per se* under the Sixth Amendment or creates a rebuttable presumption of ineffective assistance. Two of the Alabama district courts have rejected that argument on the ground that Alabama's "woefully inadequate" funding of counsel in death penalty cases "is insufficient as a matter of law to overcome the presumption of effectiveness which attends the performance of counsel."[32]

Nonetheless, Johnson could retest the argument, appealing to the suggestion in *United States v. Cronic* that "a presumption of prejudice is appropriate" when circumstances render "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" sufficiently small.[33] Johnson could distinguish his case from those previously rejected by the district courts by emphasizing his trial counsel's questioning of his own competence in the face of financial constraints. With that said, however, federal courts have so far been unwilling to

[30] *Id.* at 276.
[31] Maples v. Thomas, 564 U.S. 266, 273 (2012).
[32] Hallford v. Culliver, 379 F.Supp. 2d 1232, 1279 (M.D. Ala. 2004); *See also* Maples v. Dunn, 2015 U.S. Dist. LEXIS 121905, at *139-40 (N.D. Ala. Sep. 14, 2015) ("[Inadequate funding] does not amount to ineffective assistance of counsel unless the lack of adequate funding *caused* actual errors or shortcomings in the performance of counsel that resulted in prejudice.").
[33] 446 U.S. 648, 659.

extend *Cronic* beyond its facts.[34] As such, Johnson is very unlikely to prevail unless he can show trial counsel "entirely fail[ed] to subject the case to proper adversarial testing."[35]

[34] *See* Bell v. Cone, 535 U.S. 685, 696-97 (2002); Lewis v. Zatecky, 993 F.3d 994, 997 (7th Cir. 2021) (Reserving *Cronic* for the "extraordinary case" where defendant "receive[s] literally no assistance from his lawyer.").

[35] *Bell*, 535 U.S. at 696.

Applicant Details

First Name	**William**
Middle Initial	**B**
Last Name	**Sager**
Citizenship Status	**U. S. Citizen**
Email Address	**wsager@umich.edu**
Address	**Address** Street **35 Mount Pleasant Road** City **Morristown** State/Territory **New Jersey** Zip **07960** Country **United States**
Contact Phone Number	**973-647-2821**

Applicant Education

BA/BS From	**Williams College**
Date of BA/BS	**June 2017**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**June 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of Law Reform**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court Competition** **University of Michigan Law School Mock Trial**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Litman, Leah
lmlitman@umich.edu
Friedman, Richard
rdfrdman@umich.edu
734-647-1078
Herzog, Don
dherzog@umich.edu
734-647-4047

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Will Sager
1210 Wells Street
Ann Arbor, MI 48104
wsager@umich.edu
(973) 647-2821

May 9, 2022

Dear Judge Karas,

I am a third-year law student at the University of Michigan Law School, and I write to apply for a clerkship in your chambers for the 2024–2025 term. I am seeking a federal clerkship because I want the opportunity to think deeply about a wide range of legal issues.

I think my team-oriented, collaborative working style would be an asset to your chambers. I worked as a judicial intern in the chambers of the Honorable J. Paul Oetken after my 1L year and appreciated getting to work collaboratively with Judge Oetken's clerks. At Michigan Law, I was one of three drafters of the Henry M. Campbell Moot Court Competition Problem. I worked with my collaborators to write a mock judicial opinion about prayer before school board meetings and *Employment Division v. Smith*'s continued vitality. I truly enjoyed the experience of creating a mock appellate opinion.

I have attached my resume, law school transcript, undergraduate transcript, and two writing samples for your review. I have also included three letters of recommendation from the following Michigan Law professors:

- Leah Litman; lmlitman@umich.edu, (734) 647-0549
- Don Herzog; dherzog@umich.edu, (734) 647-4047
- Richard Friedman; rdfrdman@umich.edu, (734) 647-1078

Thank you very much for taking the time to review my application.

Best,
Will Sager

William B. Sager

1210 Wells Street, Ann Arbor, MI 48104 • (973) 647-2821 • wsager@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor GPA 3.771 (historically top 15% of law school class) — Expected May 2022
Journal: Michigan Journal of Law Reform, Contributing Editor
Honors: Fourth Place & Best Semifinal Brief, Campbell Moot Court Competition
Dean's Scholarship (2/3 tuition)
Activities: Henry M. Campbell Moot Court Competition Board Member (Problem Team)
Graduate Student Instructor, University of Michigan American Culture Department
American Constitution Society, Co-President (2L year)
Legal Practice, Senior Judge (Teaching Assistant for Legal Writing)

WILLIAMS COLLEGE — Williamstown, MA
Bachelor of Arts in Political Science, *cum laude* — June 2017
Honors: Department honors; Arthur B. Graves Class of 1858 Essay Prize
Thesis: *The Bench's Balancing Act: Examining How Judges Approach Judicial Elections*
Activities: The Williams Forum, President
Williams College Writing Workshop, Writing Tutor
University of Oxford, Exeter College, Visiting Student (2015–2016)

EXPERIENCE

SIDLEY AUSTIN LLP — Washington, DC
Summer Associate — May 2021 – August 2021

- Completed ten-week summer program and accepted offer of permanent employment upon graduation

U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK — New York, NY
Judicial Intern for the Hon. J. Paul Oetken — June 2020 – August 2020

- Worked on judicial opinions resolving motions to dismiss and for judgment on the pleadings, including a § 1983 claim, an employment discrimination matter, and a habeas petition
- Analyzed whether the Court had federal-question jurisdiction in a breach-of-contract case

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL — New York, NY
Appellate Litigation Fellow — June 2017 – June 2019

- Edited, cite-checked, and filed appellate briefs, records, and other documents
- Provided substantive feedback to attorneys regarding the clarity, structuring, and persuasiveness of filings
- Assisted with the preparation and filing of amicus briefs in federal courts across the United States

U.S. DEPARTMENT OF JUSTICE — Washington, DC
Intern, Environment and Natural Resources Division — Summer 2016

- Drafted consent letter for environmental remediation project
- Wrote memoranda on Senate and House hearings focused on effects of environmental regulations

KINETIC IN THE COURTS — Williamstown, MA
Co-Leader and Co-Founder — Fall 2014 – Summer 2015

- Founded and co-led an alternative sentencing program for local juvenile offenders
- Partnered with Berkshire Juvenile Court to develop six-week program at Williams College

ADDITIONAL

Interests: Musical theater/singing, chess, intramural basketball

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sager,William Benjamin
Student#: 80806685

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	510	002	Civil Procedure	Richard Friedman	4.00	4.00	4.00	A-
LAW	520	002	Contracts	Bruce Frier	4.00	4.00	4.00	B+
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	A
LAW	593	005	Legal Practice Skills I	Sammy Mansour	2.00		2.00	S
LAW	598	005	Legal Pract:Writing & Analysis	Sammy Mansour	1.00		1.00	S
Term Total				**GPA: 3.666**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.666**		**12.00**	**15.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	530	001	Criminal Law	David Moran	4.00		4.00	PS
LAW	540	003	Introduction to Constitutional Law	Leah Litman	4.00		4.00	PS
LAW	594	005	Legal Practice Skills II	Sammy Mansour	2.00		2.00	PS
LAW	699	001	Labor Law	Samuel Bagenstos	4.00		4.00	PS
LAW	719	001	Good with Words	Patrick Barry	2.00		2.00	PS
			Mistakes Were Made					
Term Total					**16.00**		**16.00**	
Cumulative Total				**GPA: 3.666**		**12.00**	**31.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sager,William Benjamin
Student#: 80806685

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	632	001	Law of Evidentiary Privilege	Norman Ankers	3.00	3.00	3.00	A-
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	B+
LAW	793	001	Voting Rights / Election Law	Ellen Katz	4.00	4.00	4.00	A
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	873	001	Legislation	William Novak	2.00	2.00	2.00	A
Term Total				**GPA: 3.715**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.692**		**25.00**	**46.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	569	002	Legislation and Regulation	Nina Mendelson	4.00	4.00	4.00	A
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	875	001	Privacy, Tech & 4th Amendment	Evan Caminker	2.00	2.00	2.00	A
LAW	951	001	Human Trafficking Clinic	Elizabeth Campbell Danielle Kalil	4.00	4.00	4.00	A
LAW	954	001	Human Trafficking Clinic Sem	Elizabeth Campbell Danielle Kalil	3.00	3.00	3.00	A
Term Total				**GPA: 4.000**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.797**		**38.00**	**61.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sager,William Benjamin
Student#: 80806685

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	677	001	Federal Courts	Leah Litman	4.00	4.00	4.00	B+
LAW	681	001	First Amendment	Don Herzog	4.00	4.00	4.00	A
LAW	684	001	Health Law	Nicholson Price	4.00		4.00	P
LAW	885	002	Mini-Seminar	Imran Syed	1.00		1.00	S
			Criminal Justice Reform by Comedian Jon Oliver					
Term Total				**GPA: 3.650**	**13.00**	**8.00**	**13.00**	
Cumulative Total				**GPA: 3.771**		**46.00**	**74.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
Elections as of:	01/20/2022							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00			
LAW	669	001	Evidence	Sherman Clark	3.00			
LAW	703	001	Legal Issues/Autonomous Veh	Emily Frascaroli	2.00			
				Jennifer Dukarski				
LAW	716	001	Complex Litigation	Maureen Carroll	4.00			

End of Transcript
Total Number of Pages 3

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University of Michigan Law School
Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

Copy of Official Transcript

University of Michigan
Law School

Leah M. Litman
Assistant Professor of Law

May 09, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I'm pleased to write this letter in support of Will Sager, University of Michigan Law class of 2022, who has applied for a clerkship in your chambers. Will is a smart student who displayed real gifts for appellate advocacy. He's also extremely affable and will be a wonderful addition to chambers on a personal level. I very much hope you consider his application.

I got to know Will as a student in my first-year constitutional law class in winter 2020. During the course, I regularly cold-call the students (each student is cold called about once per week). The students also complete a midterm in addition to a final exam. Because we transitioned to online courses that semester, I also met one-on-one (virtually) with the students several times in addition to normal office hours. For that reason, I got to know the students that semester fairly well.

Will was a regular participant in classroom discussions. He was always well prepared for cold calls. He was also more than happy to engage with the back and forth of law school classroom discussions, and have his ideas challenged. He was a good close reader of cases and was also adept at seeing the bigger picture across doctrinal contexts.

Will's written work was especially good. He's an organized thinker, and the clarity in his thinking came through in his writing. Even in his first year of law school, Will was producing writing that looked like it came from an upper level appellate brief rather than a first year law school exam. In this setting too, Will displayed a lawyer's sensibilities about reading and reconciling and distinguishing cases and also seeing patterns and trends in the cases. (Both the exam and the midterm are based on real-world constitutional law problems.)

I also had the chance to observe Will's performance during the semi-final rounds of the law school's moot court competition. The fact that Will advanced that far in his second year of law school is itself noteworthy, as the competition is open to all upper level students and the problem involved a complicated criminal procedure question for which Will had done no relevant course work when he started the problem at the beginning of his second year. Will's brief was terrific; it was definitely the best on his side of the issue. And in my opinion, Will was also one of the top two oralists I saw in the semi-finals. He has a relaxed demeanor and was an astute listener and adept at responding concretely to questions.

Will is also active in the law school. From his first year, Will organized events for people interested in working for the government. And he continued to organize group events for the section or for law school organizations afterwards.

Will's commitment to the community also comes through in his personality. He is extremely easy going and easy to talk to. I attended a few lunch events or organizational events with professors and students, and he could always be counted on to drive the conversation in ways that felt both easy and fun. Those softer skills will serve him well as a lawyer, and they will also be a welcome addition to chambers. He'll be well liked by the people he works with and works for.

In sum: I recommend Will for a clerkship in your chambers. If you have any questions, I would be happy to answer them. I can be reached by email at lmlitman@umich.edu or by phone at 734-647-0549. But I very much hope you consider Will's application and bring him in for an interview!

Respectfully,

Leah M. Litman

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
ANN ARBOR, MICHIGAN 48109-1215

DON HERZOG
Edson R. Sunderland Professor of Law

07 February 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I'm plain delighted to recommend Will Sager for a clerkship in your chambers. Will is one of the stars of the Michigan student body, both intellectually and personally. He will do first-rate work for you, and you'll always find him absolutely responsible and a pleasure to deal with.

I first got to know Will last summer. He had volunteered to be on the student board that runs the Campbell competition here. That's our most prestigious moot court competition. Being on the board is real work, and if you're feeling self-interested, you'll shrug and think, what's in it for me? But Will stepped up – and he stepped up for the most time- consuming and difficult part of running the competition, which was brainstorming and drafting a question. That meant doing research to surface some currently controversial topic of constitutional law. It means figuring out a fact pattern to sharpen the problem, and writing a "12th Circuit" opinion and cert. questions, and (I'm pretty sure this gets included in that role) it means drafting a lengthy memo to the judges guiding them through the legal thicket.

I often help the board, and this year's problem was in first amendment law, which I've been teaching for decades. So I started meeting with Will and his two co-conspirators on that part of the project last summer. From the outset I was just enormously impressed with him. He is calm, collected, blessed with a ready smile, thoughtful and undefensive. And he is just wicked smart. He hadn't yet taken first amendment and he had by himself worked up a deep and nuanced understanding of some knotty cases surrounding legislative prayer, free exercise, and establishment. When I raised objections or invited the three of them to put more pressure on particular features of the problem, Will wasn't daunted or discouraged. He was intrigued, sometimes actually excited. And every single time, he returned to me promptly with sharper formulations.

So I was much pleased to see Will sign up for first amendment this past semester. The class has a reputation for getting the strongest students in the school to enroll. ("Looks like a bar review meeting," one student groaned.) In that very strong group, Will stood out. He is not one to wave his hand to hear himself talk. But when he volunteered, or for that matter when I called on him "cold," I knew he would move the ball forward. And he'd do it without swaggering or posturing. He's all about the work, not about himself. We have blind grading at the school, and I wasn't the least bit surprised that Will earned an A. I'd have raised his grade a notch for first-rate class participation, but I didn't need to.

I fear most of our students don't write well. (Don't get me started on the failures of American education.) Will writes very well indeed. The prose is like the guy: no muss, no fuss, unpretentious, lucid, thoughtful, analytically crisp.

Will confesses that he wishes he had spent less of his life worrying about grades. But he adds that that hasn't deterred him from taking hard classes. Nor has it turned him into someone who obsessively studies. He sings with the law school's a cappella group. He plays chess (lots of chess). He plays intramural basketball. He'd like to find time to write a science-fiction novel. And again, whatever his psychic stance about grades, in the world he is calm and collected. It's especially remarkable in years where, thanks I suppose to covid and our politics, many of our students are conspicuously frazzled.

But first things first. Will Sager is extremely intelligent, and unlike some of the other tippy-top great students in the building, he is low-key and amiable, never one to use his intelligence to bully others into submission, and always one to take seriously that he could be wrong, he could need to go back to the drawing board and think again. Between his remarkable analytic skills with law and his being such a poised grownup, he will be an extraordinary clerk. You will rely on him without fretting, you will love having him in chambers, and you will look back years from now and think, I knew him when.

This one's easy: hire him if you can.

Sincerely,

Don Herzog

DJH:lhh

Don Herzog - dherzog@umich.edu - 734-647-4047

William B. Sager

35 Mount Pleasant Road, Morristown, NJ 07960 • (973) 647-2821 • wsager@umich.edu

Background

The following brief is a persuasive writing sample I prepared on behalf of Petitioner Raymond Turner during the 2020-2021 Campbell Moot Court Competition at the University of Michigan Law School. I placed fourth overall in this competition (out of approximately 100 participants). This brief is my work product in its entirety and has not been edited by others. The Campbell competition, for reference, is an oral advocacy exercise based on a fictional set of facts that asks law school student participants to draft briefs and prepare arguments for both Petitioner and Respondent.

This year's competition focused on whether *Brady v. Maryland* requires the pre-trial disclosure of exculpatory evidence to defendants and whether prior convictions need to be proven to a jury or may be treated as sentencing factors. This brief makes two arguments: (1) that the disclosure obligation outlined in *Brady* requires prosecutors to disclose any exculpatory evidence at the pleading stage and (2) that *Almendarez-Torres v. United States*, which held that prior convictions are sentencing factors and thus need not be proven beyond a reasonable doubt to a jury, was wrongly decided and should be overruled.

PETITIONER

IN THE

Supreme Court of the United States

No. 20-1787

RAYMOND TURNER,

Petitioner,

V.

STATE OF HUTCHINS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF HUTCHINS

BRIEF FOR PETITIONER

1
Counsel of Record

PETITIONER

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PETITIONER

TABLE OF AUTHORITIES

Cases

PETITIONER

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Constitutional Provisions

Other Authorities

PETITIONER

STATEMENT OF THE CASE

Petitioner Raymond Turner was denied his right to a fair trial when the State of Hutchins denied him access to exculpatory evidence at the plea-bargaining stage of the criminal proceedings brought against him. Worse yet, Petitioner was handed a disproportionately long sentence on the basis of shaky precedent – *Almendarez-Torres v. United States* – that several members of this Court have acknowledged was wrongly decided and an aberration in this Court's Sixth Amendment jurisprudence. Petitioner now presents two arguments to this Court: (1) that the disclosure obligation outlined in *Brady v. Maryland* requires prosecutors to disclose any exculpatory evidence defendants need to knowingly, voluntarily, and intelligently waive their trial rights, and (2) that *Almendarez-Torres*, which carved out an exception for prior convictions and held such convictions need not be determined by a jury but can be treated as a "sentencing factor" by a judge, was wrongly decided and should be overruled.

In July 2014, Petitioner was involved in an altercation with another man, Ignacio Gubaldi, at a climate change protest. *Turner v. State*, 642 Hutch. 1, 2 (2020). The State of Hutchins' case against Petitioner rested on the theory that Petitioner initiated this violence by hitting Gubaldi with a wooden two-by-four. *Id.* Six individuals interviewed by police officers corroborated the State's version of events, and Petitioner accepted this seemingly overwhelming evidence as conclusive at his plea hearing. *Id.* The State led Petitioner to believe that there was no independent support for his account of events – namely, that, while marching, he was struck in the head, from behind, with a bottle. *Id.* at 20 (Rooney, J., dissenting).

In fact, two eyewitnesses to the altercation supported Petitioner's version of events. *Id.* at 2. The police never disclosed the existence of these eyewitness accounts to Petitioner. *Id.* But Petitioner, under the mistaken impression he had no possibility of success in prevailing at trial, accepted the plea deal offered by the State. *Id.* at 1. Petitioner maintains that he *would not* have

signed this deal had the exculpatory evidence at issue – the two witness statements supporting his version of events – been made available to him. *Id.* at 2.

Petitioner agreed to a plea deal offered by the State of Hutchins that recommended a six-month sentence in order to avoid the statutory maximum of five years in prison for assault with a deadly weapon under Hutchins Statute § 254(a). *Id.* at 2, 3. The trial court, however, declined to follow the State's sentencing recommendation. *Id.* at 3. Instead, following the Hutchins Career Criminal Act, it sentenced Petitioner to eight years in prison after noting he had been previously convicted of two crimes. *Id.* This sentencing accorded with this Court's holding in *Almendarez-Torres*, which established the prior conviction exception to the general rule requiring a jury to find any fact that increases the statutory maximum or minimum penalty for a crime beyond a reasonable doubt. *Id.* at 15 (Clearwater, C.J., concurring).

Petitioner initially objected to his sentence on the grounds that any factor increasing his sentence length "must be proven to a jury" and accordingly filed a direct appeal. *Id.* at 1. Petitioner then, upon discovering the two withheld witness statements supporting his version of events, moved for a full evidentiary hearing on the grounds that the State had violated his due process rights under *Brady*. *Id.* The Hutchins Court of Criminal Appeals consolidated Petitioner's direct appeal with this motion to vacate, denied Petitioner's request for an evidentiary hearing, and affirmed Petitioner's sentence. *Id.* It reasoned that the State's disclosure obligation under *Brady* did not extend to plea negotiations. *Id.* at 3. The court also rejected Petitioner's claim challenging the prior conviction exception established in *Almendarez-Torres* and, thus, the lawfulness of the increase in his sentence. *Id.* The Hutchins Supreme Court affirmed the court of appeals on both of Petitioner's claims. Petitioner then filed a writ of certiorari with this Court.

PETITIONER

DISCUSSION

I. Prosecutors are obligated to disclose exculpatory information to defendants at the plea-bargaining stage.

Prosecutors have a duty to disclose exculpatory evidence at the plea-bargaining stage. Such disclosure is both necessary to achieve *Brady*'s goal of ensuring the fundamental fairness of the criminal justice system and can be made without creating an unworkable pre-trial discovery right. Defendants, furthermore, have a due process right to pretrial disclosure of exculpatory evidence. Finally, this disclosure obligation is consistent with this Court's holding in *United States v. Ruiz* that impeachment evidence need not be disclosed at the pleading stage because impeachment evidence and exculpatory evidence are distinguishable in the pleading stage context.

A. The disclosure obligation recognized by *Brady* extends beyond trial.

1. *Brady* is about fundamental fairness.

Brady v. Maryland was a landmark decision that, at its core, intended to ensure defendants be treated fairly by the criminal justice system. *See* 373 U.S. 83 (1963). Indeed, *Brady* affirmed the bedrock principle that "our system of justice suffers when any accused is treated unfairly." *Id.* at 87; *see Turner*, 642 Hutch. at 20 (Rooney, J., dissenting). This Court in *Brady* made clear that prosecutors violate due process where they refuse to disclose material exculpatory information to defendants upon request at trial. *Brady*, 373 U.S. at 87. But this Court's commitment to ensuring the fairness of the broader criminal justice system makes clear that this is not where the disclosure requirement articulated by *Brady* ends.

Brady's reasoning draws heavily from *Pyle v. Kansas*. In *Pyle*, this Court held the "deliberate suppression" of exculpatory evidence leading to a defendant's incarceration violated that defendant's due process rights. 317 U.S. 213, 215–16 (1942). Courts have begun to recognize that *Brady*'s bedrock fairness principle suffers where prosecutors withhold exculpatory evidence

in efforts to win guilty pleas. *See*, *e.g.*, *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.D.C. 2013) (citing *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995).[1]

The disclosure obligation articulated in *Brady*, thus, is fundamentally about fairness, and construing *Brady* solely to guarantee a right at trial contradicts this Court's well-reasoned jurisprudence recognizing that other trial rights, such as the right to counsel, require pre-trial enforcement in order to provide their intended protection. *See*, *e.g.*, *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194, 213 (2008) (recognizing the right to counsel attaches when adversarial judicial proceedings begin). This Court has similarly recognized, in the Fifth Amendment context, the need for prophylactic rules to adequately protect defendants' right against self-incrimination at trial. *Chavez v. Martinez*, 538 U.S. 760, 770–72 (2003).

This Court's intent in *Brady* to safeguard the integrity of the criminal justice system must be understood in light of how the American justice system functions today. Plea bargaining is a ubiquitous feature of that system – indeed, some scholars argue plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992); *see also Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). Well over ninety percent of federal and state criminal convictions result from guilty pleas. *Turner*, 642 Hutch. at 21 (Rooney, J., dissenting).

The facts of this case make excruciatingly clear just how unfair (and out of line with *Brady*) a criminal justice system that allows prosecutors to withhold exculpatory evidence from defendants when those defendants must decide whether to accept a jail sentence can be. Here, two

[1] As the Hutchins Supreme Court noted, the Seventh, Ninth, and Tenth Circuits have all suggested *Brady* applies at the plea-bargaining stage. *Turner*, 642 Hutch. at 8; *see McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003); *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005).

witnesses told police that Petitioner was peacefully protesting when he was attacked from behind. *Turner*, 642 Hutch. at 2. But Petitioner was forced to make his decision about whether to accept a jail sentence under the impression that the *only evidence a jury would hear* would be the testimony of witnesses claiming to have seen a different version of events transpire. *Id.* at 2–3. This outcome cannot be deemed consistent with *Brady*'s refusal to accept the unfair treatment of criminal defendants. *See* 373 U.S. at 87.

The Hutchins Supreme Court attempted to distinguish the *Brady* right from the need for protective "prophylaxes" around the rights afforded defendants under the Fifth and Sixth Amendments. *Turner*, 642 Hutch. at 5–6. The majority below argued that *Brady* is merely about "ensur[ing] the integrity of the jury's . . . verdict" and not, as in the Sixth Amendment context, about safeguarding the broader "integrity of the adversarial system." *Id.*[2] This is an incorrect reading of *Brady*. The U.S. District Court for the District of Columbia rightly noted in *Nelson* that though one of *Brady*'s aims was ensuring a fair trial, *Brady* also sought to ensure defendants were fairly treated by the criminal justice system. 979 F. Supp. 2d at 130.

2. Extending *Brady* to require pretrial disclosure of exculpatory evidence does not create intractable line-drawing problems.

Critics of the idea that *Brady* applies at the pre-trial pleadings stage contend that interpreting *Brady* to require the disclosure of exculpatory evidence would create an unwieldy, general discovery right for defendants. *See*, *e.g.*, *Turner*, 642 Hutch. at 6 (refusing to impose such a "hefty burden on the prosecution"). This concern is ill-founded. Chief Justice Clearwater, concurring below, rightly pointed out that the correct standard for determining what exculpatory

[2] Several circuits have (unlike the Seventh, Ninth, and Tenth Circuits) similarly held that *Brady* provides a trial right that does not extend to the plea-bargaining stage. *See*, *e.g.*, *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010).

evidence must be disclosed at the plea-bargaining stage is voluntariness. *See Turner*, 642 Hutch. at 12 (Clearwater, C.J., concurring).[3] Indeed, this Court has made clear that constitutional rights may only be waived when such waiver is knowing, intelligent, and voluntary. *Brady v. United States*, 397 U.S. 742, 748 (1970). This standard applies in the Sixth Amendment context, where "any waiver of the right to counsel must be knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 78 (2004) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Petitioner's guilty plea in this case cannot be deemed to have been entered voluntarily. Specifically, whether a plea was entered voluntarily is determined by the totality of the circumstances. *Brady*, 397 U.S. at 749; *see also Turner*, 642 Hutch. at 12-13 (Clearwater, C.J., concurring). Petitioner was struck in the head on the night of the incident and led to believe that "the sheer weight of the evidence was against him." *Id.* at 2; *id.* at 20 (Rooney, J., dissenting). Indeed, Petitioner was presented with the prospect of six witnesses willing to corroborate the State's account that Petitioner instigated violence but deprived of the knowledge that two other witnesses supported Petitioner's version of events. *Id.* at 2. Petitioner's plea was clearly involuntary under a totality of the circumstances test.

Contrary to what the concurring Justices argued below, pleas should not be vacated only when prosecutors willfully or egregiously fail to disclose exculpatory evidence. *See Turner*, 642 Hutch. at 13 (Clearwater, C.J., concurring). Whether or not a plea was involuntarily given does not turn on whether the prosecutors engaged in deliberate deception, *see United States v. Fisher*, 711 F.3d 460, 467–68 (4th Cir. 2013), or whether the failure to disclose particular evidence was

[3] The dissenting Justices below argue that the appropriate standard for determining which evidence prosecutors must disclose at the plea-bargaining stage is governed by the question of whether "but for the defense counsel's errors, there is a reasonable probability that the outcome of the plea process would have been different." *Turner*, 642 Hutch. at 21 (Rooney, J., dissenting). But this standard would be far too difficult for courts to apply – voluntariness is an easier-to-apply standard that is in keeping with this Court's approach to assessing waivers of constitutional rights. *See id.* at 12 (Clearwater, C.J., concurring).

egregious, *see Ferrara v. United States*, 456 F.3d 278, 291 (1st Cir. 2006). The totality of the circumstances test for voluntariness in *Brady v. United States* makes clear that guilty pleas may be invalidated where defendants lack enough information to make a knowing, intelligent, and voluntary waiver of their trial right. 397 U.S. at 755.

B. Petitioner has a due process right to exculpatory evidence at the plea-bargaining stage.

Second, the Fourteenth Amendment guarantees defendants fair treatment by the criminal justice system. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). This due process inquiry turns on three factors: (1) the private interest at stake given state action, (2) the governmental interest that would be impacted by the safeguard, and (3) the likely value of adding procedural safeguards given "the risk of an erroneous deprivation of the affected interest" if the safeguards are not implemented. *Id.* at 77. As the dissenting Justices below rightly noted, all three factors weigh in Petitioner's favor. The private interest at stake is Petitioner's freedom and thus great, the government interest in the efficient administration of justice would not be unduly disrupted by extending *Brady*, and the value of disclosing exculpatory evidence is high.

The first factor can be dispensed with quickly – both parties would acknowledge that Petitioner's freedom is a substantial private interest. The next question involves the degree to which the government would be burdened by being forced to disclose exculpatory information at the plea-bargaining stage. The government's contention that extending *Brady* would subvert the efficiency of plea-bargaining has not been borne out in circuits where pre-plea *Brady* disclosures are required. *Id.*; *see also* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 Case W. L. Rev. 651, 665 (2007).

The value of disclosing exculpatory evidence at the plea-bargaining stage, finally, is high. The balance of power in plea-bargaining lies with the State: defendants, worried about the

possibility of harsh sentences, are incentivized to forego the protections of trial. *See* Scott & Stuntz, *supra*, 1912. Scholars have recognized the coercive impact of this power imbalance. *See*, *e.g.*, Josh Bowers, *Plea Bargaining's Baselines*, 57 Wm. & Mary L. Rev. 1083, 1091 (2016) (noting that "the issue of coercion would seem to be front and center"). Disclosing exculpatory evidence at the plea-bargaining stage helps to rectify the power imbalance between prosecutors and defendants and ensure that defendants are able to voluntarily make the crucial decision to waive (or not waive) their Sixth Amendment right to a jury trial.

C. Finding *Brady* applies to plea-bargaining proceedings accords with this Court's holding in *Ruiz*.

Exculpatory evidence is fundamentally different from impeachment evidence. In *United States v. Ruiz*, this Court held the Constitution does not require the government to disclose impeachment information at the plea-bargaining stage and that material impeachment information need not be disclosed before trial in order for a waiver of the trial right to be sufficiently voluntary. 536 U.S. 622, 629 (2002) (citing *United States v. Brady*, 397 U.S. 742, 748 (1970)).

Most importantly, this Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." *Id.* at 630. While impeachment information might (or might not) help a defendant's case, exculpatory information is "simply different in kind" because of the much greater likelihood that its disclosure will help a defendant's case. *Turner*, 642 Hutch. at 20 (Rooney, J., dissenting); *see also* Cameron Casey, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on* Brady *Obligations During Plea-Bargaining*, 61 B.C. L. Rev. E. Supp. II.-73, II.-91 (arguing exculpatory evidence is critical to defendants).

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Indeed, *Ruiz* distinguished impeachment evidence from exculpatory evidence in declaring that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*. *Ruiz*, 536 U.S. at 629; *see also McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003) (reading *Ruiz* to hold that impeachment evidence and exculpatory evidence are "entirely different"). The Seventh Circuit noted in *McCann*, on the other hand, that defendants are unlikely to be able to voluntarily waive their right to trial when exculpatory evidence is not disclosed at the plea-bargaining stage. *See* 337 F.3d at 787.

The majority below found *Ruiz* forecloses petitioner's *Brady* argument because impeachment evidence and exculpatory evidence are "inextricably linked" in this Court's jurisprudence. *Turner*, 642 Hutch. at 4; *see*, *e.g.*, *Giglio v. United States*, 405 U.S. 150, 154–55 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985). *Bagley*, for instance, rejected the idea that there was a constitutional difference between impeachment evidence and exculpatory evidence at trial. 473 U.S. at 676. But as the dissenting Justices correctly recognized below, this Court in *Ruiz* explicitly "erected a line between impeachment and exculpatory evidence." *Turner*, 642 Hutch. at 22 (Rooney, J., dissenting). It is precisely because this Court had previously treated impeachment evidence and exculpatory evidence similarly that *Ruiz* is so instructive: in *Ruiz*, this Court explained why these two types of evidence do not impact plea-bargaining in the same way.

II. *Almendarez-Torres* was incorrectly decided and should be overruled.

Almendarez-Torres and its progeny carved out prior convictions as the sole exception to the general rule that facts that increase the severity of punishment for a crime be proven to a jury. Treating prior convictions as sentencing factors exempt from having to be proven to a jury violates defendants' Sixth Amendment right to trial by an impartial jury and flies in the face of historical practice. Further, *stare decisis* does not counsel against overruling *Almendarez-Torres*, regardless of which rules are applied. For both reasons, *Almendarez-Torres* should be overruled.

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A. Treating prior convictions as sentencing factors rather than as elements of a crime is an artificial distinction that violates the Sixth Amendment.

In *Almendarez-Torres v. United States*, this Court held that recidivism is a sentencing factor, rather than an element of a crime, that can serve as the basis for an increased sentence. 523 U.S. 224, 243–44 (1998). This decision was subsequently reaffirmed (but narrowed) in *Apprendi v. New Jersey*, which held that, with the *sole exception* of prior convictions, "any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). This Court should overrule the exception created in *Almendarez-Torres* (and restated in *Apprendi*) because it violates defendants' constitutional rights on the basis of an artificial distinction grounded in a misreading of history.

The distinction between elements of a crime and sentencing factors has consequences. Criminal defendants are entitled, under the Sixth Amendment, to be given a trial before an "impartial jury." U.S. Const. amend. VI. The Due Process Clause, read alongside the Sixth Amendment, requires that every element of a crime be proven to a jury beyond a reasonable doubt before a defendant can be convicted. *In re Winship*, 397 U.S. 358, 364 (1970); *see also Turner*, 642 Hutch. at 25 (Rooney, J., dissenting). This Court in *Almendarez-Torres* declared that recidivism is not an element of a crime but rather "as typical a sentencing factor as one might imagine." 523 U.S. at 230. Chief Justice Clearwater, concurring below, argued that recidivism should not be considered an "element" of a crime because it does not bear on a defendant's guilt for the crime charged. *See Turner*, 642 Hutch. at 17. But this misunderstands what it means for something to be an element of a crime. As Justice Thomas explained in his concurrence in *Apprendi*, *Almendarez-Torres* was wrongly decided precisely because a fact is an element of a crime if it "is by the law the basis for imposing or increasing punishment." 530 U.S. at 521.

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This understanding that a fact is an element of a crime where is it the basis for a more severe punishment is firmly grounded in historical practice. From the late 18th century to the 19th century, courts resisted "departing from the common law rule that required the initial charge to allege any prior offense that increased punishment." Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 Marq. L. Rev. 523, 552 (2014). The Supreme Court of Pennsylvania squarely held in an early 19th-century case that a more severe punishment could be imposed only if the fact of the prior conviction appeared in the indictment and the record. *See Smith v. Commonwealth*, 14 Serg. & Rawle 69 (1826). And the dissent below correctly points out the longstanding tradition of state supreme courts treating prior convictions as elements of offenses. *See Turner*, 642 Hutch. at 26 (Rooney, J., dissenting); *see*, *e.g.*, *State v. McClay*, 78 A.2d 347, 352 (Me. 1951); *People v. McDonald*, 206 N.W. 516, 517–18 (Mich. 1925).

Proponents of retaining *Almendarez-Torres* distinguish recidivism as a sentencing factor rather than an element of a crime by arguing that prior convictions were established with procedural safeguards that makes proving the fact of the initial crime to a jury unnecessary. *See Turner*, 642 Hutch. at 17 (Clearwater, C.J., concurring). In *Jones v. United States*, this Court reasoned that a prior conviction need not be proven to a jury because it was "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 526 U.S. 227, 249 (1999).[4]

[4] It may be the case that the existence of a prior conviction is reliable evidence of recidivism. *See*, *e.g.*, Daniel J. Kennedy, Note, *Nonjury Juvenile Adjudications as Prior Convictions Under* Apprendi, 2004 U. Ill. L. Rev. 267, 271 (2004) (noting that such convictions are "presumed reliable"). Even if we assume this increased reliability exists, this assumption does not alter the joint requirement of the Sixth Amendment and due process that, where a fact is the basis for an increased punishment, it is an element of a crime that must be proven to the jury. *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring).

B. The doctrine of *stare decisis* does not counsel against overruling *Almendarez-Torres*.

Stare decisis is a longstanding (if somewhat flexibly applied) doctrine that "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). But the doctrine, this Court has repeatedly emphasized, is not an "inexorable command." *Id.* at 828. Rather, in assessing the value of preserving precedent, this Court has historically examined several categories of factors.

Most recently, the plurality opinion in *Ramos v. Louisiana* identified four such factors: (1) "the quality of the decision's reasoning," (2) the decision's "consistency with related decisions," (3) subsequent legal developments, and (4) "reliance on the decision." 140 S. Ct. 1390, 1405 (2020) (citation omitted). Justice Sotomayor, concurring in *Ramos*, noted that the force of the doctrine is at its lowest ebb "in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections." 140 S. Ct. at 1409 (Sotomayor, J., concurring) (citing *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013). And in *Patterson v. McLean Credit Union*, this Court noted the utility of assessing the workability of the decision in a *stare decisis* analysis. 491 U.S. 164, 173 (1989). By nearly any measure, *Almendarez-Torres* should be overruled.

1. *Almendarez-Torres* relies on mistaken reasoning.

This Court was mistaken in its decision to treat prior convictions as sentencing factors that need not be proven to a jury rather than elements of a crime. *See Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring); *see*, *e.g.*, *Ramos*, 140 S. Ct. at 1405. Justice Thomas, an original member of the *Almendarez-Torres* majority, has since explained that where "a fact is by law the basis for imposing or increasing punishment . . . it is an element." *Id.* Indeed, this treatment of the fact of a prior conviction accords with the historical treatment of recidivism as an element of a crime.

Turner, 642 Hutch. at 26 (Rooney, J., dissenting); *see*, *e.g.*, *Tuttle v. Commonwealth*, 68 Mass. (2 Gray) 505, 506 (1854). This Court, moreover, held in *Apprendi* that juries must consider any fact that "increase[s] the range of penalties to which a criminal defendant is exposed." 530 U.S. at 490 (citation omitted).

Opponents of treating recidivism as an element of a crime (rather than a sentencing factor) contend juries will be prejudiced against defendants if forced to consider their prior bad acts. *See Turner*, 642 Hutch. at 27 (Rooney, J., dissenting). But this worry does not, on its own, transform what Justice Thomas correctly explains is an element of a crime into a sentencing factor. *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring). Moreover, there are ways to structure criminal trials that could ameliorate the risk of prejudiced juries. *See*, *e.g.*, King, *supra*, at 960. These remedies include bifurcating the trial or otherwise limiting what the jury hears about the prior conviction so as to limit any prejudicial effect of its disclosure. *See id.*

2. *Almendarez-Torres* is inconsistent with related decisions and subsequent legal developments.

Almendarez-Torres has become a doctrinal anachronism, and this fact weighs against applying *stare decisis*. *See*, *e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992). Though *Almendarez-Torres* affirmed the distinction between sentencing factors (which the Court held to include recidivism) and elements of crimes, this Court in *Apprendi* held that any factor, aside from recidivism, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." 530 U.S. at 489–90. This marked a retreat from the conceptual framework of *Almendarez-Torres* and acknowledged that *Almendarez-Torres* established at most a "narrow exception" to a "general rule." *Id.*[5] This Court then, as noted *supra*,

[5] This Court pointed out in *Apprendi* the possibility that *Almendarez-Torres* was incorrectly decided. *See* Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 439–40 (2010).

extended this rule further to any fact increasing a statutory maximum or minimum sentence. *See Alleyne*, 570 U.S. at 111-12. This whittling away of *Almendarez-Torres* is strong evidence that the decision has become a doctrinal anachronism.

Further, the trend in this Court's Sixth Amendment jurisprudence has been decidedly in favor of expanding defendants' rights to jury trials. *See Turner*, 642 Hutch. at 28 (Rooney, J., dissenting). In *Hurst v. Florida*, for instance, Florida's statutory scheme allowing sentence increases based on judicial factfinding was struck down as violative of defendants' Sixth Amendment rights. 577 U.S. 92, 99 (2016).

3. The prior conviction exception is unworkable.

The workability of the prior convictions exception is potentially the only *stare decisis* factor that does not weigh decisively against overruling *Almendarez-Torres*. Nonetheless, the exception has proven difficult to apply in certain contexts. For instance, courts have struggled to determine whether juvenile delinquency adjudications should count as prior convictions. *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111, 1196–1203 (2003); *compare United States v. Tighe*, 256 F.3d 1187, 1194–95 (9th Cir. 2001) (holding that the prior conviction exception excludes "nonjury juvenile adjudications"), *with United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002) (finding the opposite). Similarly, courts have disagreed about whether the prior conviction exception applies to a defendant's supervised release status. *See* Eric C. Tung, *Does the Prior Conviction Exception Apply to a Criminal Defendant's Supervised Release Status?*, 76 U. Chi. L. Rev. 1323 (2009). These disagreements suggest that the prior conviction exception originally established in *Almendarez-Torres* has proved difficult to implement consistently. In the words of the dissenting Justices of the Hutchins Supreme Court, it would be far easier for the courts to administer a "rule without

exception" rather than retain the awkward carve-out for prior convictions. *See Turner*, 642 Hutch. at 27 (Rooney, J., dissenting).

4. *Almendarez-Torres* has not spawned significant reliance interests.

This Court in *Apprendi* acknowledged that it is "arguable" *Almendarez-Torres* was incorrectly decided. 530 U.S. at 489. More than 5,000 defendants have filed federal appeals requesting the decision's reversal. *Turner*, 642 Hutch. at 28 (Rooney, J., dissenting) (citing Brent E. Newton, Almendarez-Torres *and the* Anders *Ethical Dilemma*, 45 Hous. L. Rev. 747, 802 (2008)). Further, the argument that there is substantial governmental reliance on *Almendarez-Torres* is misleading. *See*, *e.g.*, *Turner*, 642 Hutch. at 29 (Rooney, J., dissenting). There is simply no reason why prosecutors would be unable, should the prior conviction exception be discarded, to prove facts (in this case, prior convictions) that could yield more severe sentences to a jury. *See Alleyne*, 570 U.S. at 119 (2013) (Sotomayor, J., concurring); *Turner*, 642 Hutch. at 29 (Rooney, J., dissenting).

* * *

In sum, the doctrine of *stare decisis* does not weigh against overruling *Almendarez-Torres*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the Hutchins Supreme Court on both of the questions before it.

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Journal(s)	**Georgetown Journal of Legal Ethics**
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Bar Admission

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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5/9/2022

The Honorable Judge Kenneth M. Karas
U.S. District Court for the Southern District of New York
The Hon. Charles L. Brieant Jr. Federal Building and U.S. Courthouse
300 Quarropas St., Courtroom 521
White Plains, NY 10601

Dear Judge Karas,

I am a 2021, *cum laude* graduate of Georgetown University Law Center, and I am writing to apply for a 2024 term clerkship in your chambers. By then I will have had three years of litigation experience at Sidley Austin. On top of that, my five years of post-college, pre-law-school work experience; over 120 hours of pro bono legal services throughout law school; substantial experiential education almost every semester of law school I was permitted; and summer legal internships give me the professional and legal experience to excel as your clerk.

Clerking is a career goal because it would allow me to contribute to the legal field and serve the public while also gaining litigation skills and mentorship that will guide me in my career. Clerking in White Plains would allow me to stay in New York City, where I currently live, grew up, and hope to build a legal career.

I have enclosed my resume, transcript, and writing sample. Recommendation letters will be sent separately from:

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You may also contact Tony Axam, Assistant Public Defender at the Federal Public Defender for D.C., as a reference. He can be reached at 202-246-8420 or Tony_Axam@fd.org.

Please let me know if I can provide any additional information. Thank you very much for your consideration.

Respectfully,
Rachel Schwartz

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EDUCATION

Georgetown University Law Center, Washington, D.C. May 2021
J.D., *cum laude*, Special Pro Bono Pledge Recognition, Section 3
GPA: 3.65
Journal: Georgetown Journal of Legal Ethics (Executive & Submissions Editor)
Clinic: Appellate Courts Immersion Clinic (Spring 2020)
Activities: Public Interest Fellow
Jewish Law Student Association (Executive Member-at-Large)
Lawcappella, A Cappella Group (Vice President; Soprano)

Northwestern University, Chicago, IL June 2013
B.A., *magna cum laude*, philosophy and psychology
GPA: 3.84
Honors: Phi Beta Kappa; Dean's List; Philosophy Honors; Brady Scholar in Ethics and Civic Life
Thesis: Philosophy, *Agreeing to Disagree: A Defense*
Awards: Weinberg Summer Research Grant, Philosophy Thesis Research
Tikvah Summer Fellow in Jewish Thought, Princeton University

EXPERIENCE

Sidley Austin LLP, Associate, New York, NY Nov. 2021–Present

Mobilization for Justice (MFJ), Sidley Austin Pro Bono Fellow, New York, NY Sept. 2021–Nov. 2021
- Represented low-income taxpayers in routine disputes with the IRS through the MFJ Low Income Tax Clinic

Sidley Austin, Summer Associate, New York, NY July 2020
- Conducted, analyzed, and presented research for litigation matters

ACLU, Extern, Project on Freedom of Religion and Belief, Washington, D.C. Sept. 2019–Dec. 2019
- Conducted legal research for Supreme Court briefs and an opposition to a petition for certiorari
- Strategized, identified issues, and conducted research in preparation to file a new case in federal district court

The Legal Aid Society, Summer Intern, New York, NY May 2019–Aug. 2019
- Advocated for clients from intake to judgment, preventing evictions and correcting housing violations

Rosov Consulting, Project Associate, Chicago, IL June 2016–July 2018
- Guided strategic planning for nonprofit organizations, generating Theories of Change and Logic Models
- Created evaluation tools, conducted interviews and focus groups, collected survey data, and analyzed findings
- Wrote executive reports and presented findings to clients

Interfaith Youth Core (IFYC), Campus Assessment Associate, Chicago, IL July 2013–May 2016
- Coordinated religious climate surveys, wrote reports, stewarded strategic data use on 25+ college campuses
- Organized largest U.S. interfaith initiative and conference with U.S. Dep't of Educ. for over 400 campuses
- Trained and mentored social justice leaders on 40 campuses, recruited 200 people for IFYC initiatives

PRO BONO AND VOLUNTEERING

Federal Public Defender for D.C., Summer Intern, Appeals (Washington, D.C., May 2020–June 2020)
Washington Lawyers' Committee, Workers' Rights Clinic Intake Volunteer (Washington, D.C., 2019–2020)
Crisis Text Line, Volunteer Crisis Counselor (Chicago, IL, 2014–2018)
One Northside, Volunteer Mental Health Justice Organizer (Chicago, IL, 2013–2018)

Interests: Jogging, singing, windowsill gardening, vegetarian cooking

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Rachel Schwartz
GUID: 828779224

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 09, 2021
Georgetown University Law Center
Major: Law
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	93	Legal Process and Society Lawrence Solum	2.50	IP	0.00	
LAWJ	002	93	Bargain, Exchange & Liability David Super	3.00	IP	0.00	
LAWJ	005	30	Legal Practice: Writing and Analysis Jessica Clark	2.00	IP	0.00	
LAWJ	007	32	Property in Time Sherally Munshi	4.00	A-	14.68	
LAWJ	009	35	Legal Justice Seminar David Luban	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	7.00	7.00	24.67	3.52
Cumulative	7.00	7.00	24.67	3.52

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	B	15.00	
LAWJ	002	93	Bargain, Exchange and Liability Part II: Risks and Wrongs David Super	6.00	A	24.00	
LAWJ	003	93	Democracy and Coercion Allegra McLeod	4.00	A-	14.68	
LAWJ	005	30	Legal Practice: Writing and Analysis Kristen Tiscione	4.00	B+	13.32	
LAWJ	008	93	Government Processes Jonathan Molot	4.00	A-	14.68	
LAWJ	611	01	Restorative Justice Thalia Gonzalez	1.00	P	0.00	

Dean's List 2018-2019

	EHrs	QHrs	QPts	GPA
Current	24.00	23.00	81.68	3.55
Annual	31.00	30.00	106.35	3.55
Cumulative	31.00	30.00	106.35	3.55

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	1433	05	Law and Religion Stephanie Inks		NG		
LAWJ	1433	81	Law & Religion~~Sem Stephanie Inks	2.00	A-	7.34	
LAWJ	1433	82	Law & Religion~~Field Work Stephanie Inks	2.00	P	0.00	
LAWJ	1497	05	Urban Law and Policy Seminar Sheila Foster	3.00	A	12.00	
LAWJ	165	07	Evidence Gerald Fisher	4.00	A-	14.68	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B+	13.32	
LAWJ	514	05	Introduction to Scholarly Note Writing Jessica Wherry	1.00	P	0.00	

Dean's List Fall 2019

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	47.34	3.64
Cumulative	47.00	43.00	153.69	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	049	05	Appellate Courts and Advocacy Workshop Brian Wolfman	2.00	P	0.00	
LAWJ	504	05	Appellate Courts Immersion Clinic Brian Wolfman		NG		
LAWJ	504	30	~Writing Brian Wolfman	4.00	P	0.00	
LAWJ	504	80	~Research and Analysis Brian Wolfman	4.00	P	0.00	
LAWJ	504	81	~Advocacy & Client Relations Brian Wolfman	4.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	14.00	0.00	0.00	0.00
Annual	30.00	13.00	47.34	3.64
Cumulative	61.00	43.00	153.69	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	121	07	Corporations Charles Davidow	4.00	A-	14.68	
LAWJ	1461	05	Race and Poverty in Capital and Other Criminal Cases Seminar Stephen Bright	2.00	A	8.00	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Joshua Geltzer	5.00	A-	18.35	
LAWJ	1631	05	Federal Practice Seminar: Contemporary Issues Irving Gornstein	2.00	A-	7.34	
LAWJ	361	02	Professional Responsibility Peter Tague	2.00	A-	7.34	

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Unofficial

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Record of: Rachel Schwartz
GUID: 828779224

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	55.71	3.71
Cumulative	76.00	58.00	209.40	3.61

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1322	05	Civil Rights Statutes and the Supreme Court Seminar	2.00	A-	7.34	
	Irving Gornstein						
LAWJ	135	05	Law Firm Economics and the Public Interest	1.00	P	0.00	
	Steven Schulman						
LAWJ	1512	05	Constitutional Litigation and the Executive Branch	2.00	A	8.00	
	Joshua Matz						
LAWJ	1606	08	Motherhood and the Law Seminar	2.00	A	8.00	
	Stephanie Inks						
LAWJ	1652	05	Criminal Justice II: Criminal Trials	3.00	P	0.00	
	Michael Gottesman						
LAWJ	178	09	Federal Courts and the Federal System	3.00	A	12.00	
	Kevin Arlyck						

Dean's List Spring 2021

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	9.00	35.34	3.93
Annual	28.00	24.00	91.05	3.79
Cumulative	89.00	67.00	244.74	3.65

End of Juris Doctor Record

Unofficial

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 09, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

Without reservation, I wholeheartedly recommend Rachel Schwartz for a clerkship in your chambers. I have known Rachel over the past three years. Rachel was a student in my Legal Practice: Writing and Analysis course at Georgetown Law during the 2018-19 academic year. As a second-year student, Rachel took my upper-level writing seminar, Introduction to Scholarly Note Writing, during the fall 2019 semester. She has continued to be in touch with me and I am delighted by her decision to pursue a clerkship. Through class and office hours, I have come to know Rachel well and have enjoyed keeping up with her many academic and employment achievements.

Rachel's intellectual abilities were clear from her work in the Legal Practice course; she regularly contributed to class discussions with insightful questions. From the very start of the course, she was committed to the process of learning legal analysis and effective communication of that analysis. In the fall semester, she wrote a good exam, scoring squarely in the B+ range of the hypothetical curve (hypothetical because there is a single course grade awarded at the end of the two semesters). Throughout the year, Rachel worked hard to develop and refine her legal research and writing skills. Her B+ for the course does not adequately reflect her improvement during the year; by the end of the course, she was solidly within the top third of the class. Her final grade of a B+ was only 3 points away from the A- line.

More recently, I have had the opportunity to see the strengths in Rachel's legal research and writing as part of her coursework in Introduction to Scholarly Note Writing. This course serves as a structured writers' workshop for students writing scholarly papers, often for publication or seminars. Rachel worked closely with me over the course of the semester as she developed her ideas and worked toward a solid draft. We continued to workshop her paper into the spring semester. Her final paper demonstrated her significant and unique intellectual ideas as she identified a problem in New York City housing related to the warranty of habitability, and developed a balanced practical approach to address the problem through the lens of ethical lawyering.

My experience with Rachel in the Introduction to Scholarly Writing Course also gave me a deeper appreciation for her personality strengths. My typical approach to the course is to pair student writers for peer reviews throughout the semester. Early on in the semester, Rachel's partner dropped the class and I substituted in for Rachel's partner. For some students, this change could have been a source of stress or frustration, but Rachel handled it with her easygoing, even-keeled nature. She was flexible in working with me to find mutually agreeable meeting times that were outside the regular class time, and she was invested in every conversation we had about her paper. Honestly, it was my pleasure to be able to work closely with her, in a way that I cannot do with every student but that worked well given the loss of her partner.

Rachel came to law school with an exceptional academic record and a commitment to seeking a clerkship as part of her plans for a legal career in appellate advocacy. Rachel sees a clerkship as an opportunity to continue her professional development. She has a reputation for seeking feedback and implementing that feedback. She did that to the highest degree in both courses she took with me, and given her commitment to the feedback process, she has established herself as a reliable professional capable of and committed to high-quality work product. Rachel recently shared with me an example of feedback she received from an employer. During her time at the ACLU, Rachel asked for feedback on her performance. The supervisor had no constructive feedback, but instead told Rachel that one of the best things about working with Rachel was that the supervisor never doubted the thoroughness and reliability of Rachel's research. The supervisor was able to confidently rely on Rachel's work. This feedback is a testament to Rachel's skilled approach to legal research and writing, and she would bring this thoroughness and reliability to your chambers.

Rachel is an ideal candidate to join your chambers because of her commitment to legal research and writing and passion for advocacy. Having worked in legal services, Rachel looks forward to expanding her experience from the perspective of an impartial decisionmaker. She is enthusiastically interested in learning how you think about cases. Rachel would also benefit from the opportunity to read a high volume of briefs and motions, as she continues to develop her own legal research and writing skills. With her quiet maturity and good-naturedness, Rachel would bring intelligence and enthusiasm to any task.

Please do not hesitate to contact me if there is any additional information I can provide. I can be reached at 202-662-9528 or jessica.wherry@law.georgetown.edu.

Very best wishes,

Jessica Wherry - jessica.wherry@law.georgetown.edu - 443-889-6140

Jessica L. Wherry
Associate Professor of Law, Legal Practice

Jessica Wherry - jessica.wherry@law.georgetown.edu - 443-889-6140